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POLITICAL SYSTEMS
IN TRANSITION

The Century New World Series

W. F. WILLOUGHBY, GENERAL EDITOR

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POLITICAL SYSTEMS IN TRANSITION

By Charles G. Fenwick

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The Century New World Series

POLITICAL SYSTEMS IN TRANSITION

WAR-TIME AND AFTER

BY

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To
W. W. WILLOUGHBY
WITH SINCERE REGARD

PREFACE

Never perhaps have the hopes of democratic idealism been higher than on the day of the signing of the armistice which brought the World War to a close. It seemed as if the promised land of international cooperation and domestic regeneration were in sight, and that it needed but a simple readjustment of abnormal conditions to mark the inauguration of a new era. Autocracy had been overthrown and humiliated. Germany and Austria were in the throes of a revolution, Turkey was at the mercy of the Allies, and Russia, though for the moment in a state of confusion, was forever freed of the despotic rule of the Czar and his court. By contrast, the victorious democracies, under the inspiration of the ideals aroused by the war, were prepared to take in hand the conditions of their national life and reconstruct their political systems in accordance with those fundamental principles of justice which had been evoked against their common enemy. The world had been made safe for democracy; democracy was now to prove itself worthy of the sacrifices made in its name.

The anniversary of the signing of the armistice was a day of complete disillusionment. Autocracy was still overthrown, but it seemed doubtful whether in some of the states it had not been succeeded by a dictatorship of the proletariat far more dangerous than its own régime had been. Germany, with its new democratic constitution, gave some promise of stability; but it was believed by many that there had been no change of heart on the part of the German people, and that the conception of state morality which had characterized the Germany of 1914 persisted as strongly as ever under the rule of the people. Austria and Hungary were reduced to the point of utter national exhaustion, while Russia had revived for the time the despotism of the Czar in the reaction of its more radical elements against counter-revolutionary movements and the intervention of the Allied armies. On the other

hand the democratic governments had apparently made no progress whatever towards the fulfilment of the hopes of reconstruction and reform. France and Italy were wholly absorbed in the effort to consolidate the fruits of victory ; Great Britain was in the hands of a Parliament which had been elected at an inopportune time, and which was intent upon maintaining imperial interests and seemed not to be seriously concerned with the task of improving social conditions at home. In the United States the contest between a Democratic President and a Republican Senate had brought the machinery of government to a deadlock, and practical problems of domestic readjustment stood neglected in the presence of artificial differences created by the struggle for party control. The old order not only had not changed, but it seemed to be in many respects more strongly entrenched than ever. Judging by actual accomplishments there was little to show that there was in the minds of statesmen any higher purpose than to return to the accustomed ways of 1914.

If in outward appearance, however, there was and is still but little change in the political systems of the great democratic nations, one has only to look beneath the surface to find new forces at work which may in time fulfil the high ideals which the war called forth. While Germany, Austria, Hungary, and Russia are working out with varying degrees of internal disturbance their new forms of democratic government, the older democratic nations are passing through a critical phase in their history. The changes which they underwent in adjusting their governments to the demands of war, and the further changes required to place their governments again upon a peace basis, have brought to the surface many of the fundamental principles of democracy which had become buried beneath the routine of normal political life. The task of transforming a whole nation into an efficient fighting machine made it necessary to demand sacrifices from the individual citizen which could only be obtained in full measure by an appeal to the noblest motives of citizenship. But the emphasis laid upon

duty to the state naturally led to the inquiry whether the state in its existing form was worthy of the sacrifice which it demanded. As an organization for the promotion of freedom and justice, true to its purpose, the state might well ask for all that the citizen could give to preserve it. But if the state were in any way the instrument of special privilege for the few as against the interests of the many, if the state fostered an industrial autocracy which made political democracy meaningless, if the state defeated its own purpose by preventing the free expression of public opinion and denying the equality of rights which it was intended to protect and maintain, then its absolute claim upon the life and property of the citizen was far less convincing than had been assumed. The issues thus raised are still a powerful undercurrent in American political life, and in somewhat different form in the political life of Great Britain, of France and of Italy.

In addition to this inquiry into fundamental principles further questions are being put as to the organization of the state and the scope of the functions it is to perform. In the United States the war has made it clear to all that there are serious defects in the machinery of the Government; while the emergency in which those defects were manifested has impressed upon us in a forcible way the need of radical amendments to our constitutional system. Apart from the experience of the war it is a common observation that modern democracy, in growing more and more complex in its machinery, tends of necessity to defeat its object of securing freedom and justice unless constant readjustments are made to offset the control of special groups and factions. In like manner the necessity which the war created of bringing under national control the production and distribution of essential supplies has raised the issue of permanent government control wherever this is necessary to protect the public against artificial restraints of trade. At the same time critical strikes in the great industrial centers have called for the intervention of the Government between labor and capital in the interest of safe-

guarding the community as a whole. Thus the functions of the State have been greatly enlarged, and there is every prospect that while still repudiating Socialism as a theory the State will before long have put into practice many of its more moderate principles. Lastly, the war has raised a new issue hitherto outside the range of practical politics. The problem of international organization has become the most pressing question upon the program of reconstruction. The participation of the United States in a permanent association of the nations must, if any practical results are to be obtained from such cooperation, affect profoundly the conduct of our foreign relations and in due time have its reactions upon domestic affairs as well. No assertions of a traditional isolation can long hold out against the logic of the demand for "a governed world."

In view of the urgency and importance of the issues thus raised it cannot be said that even the democratic nations have escaped from the war with their political systems unshaken by the great conflict. Their constitutions may be for the time intact, but they have entered upon a period of transition in which it is to be determined whether democracy can hold its own not only against the enemy from without but against the disintegrating forces from within. The present study is an attempt to survey the changes brought about by the war in the governments of the great nations, and particularly in that of the United States, and in so doing to exhibit, by comparison and contrast, the relative strength and weakness of the several political systems and the probable lines of future reconstruction. In the case of the United States special attention has been given to the constitutional questions involved in the adjustment of the government to the demands of the war, both for the purpose of making clear the principles involved in the measures taken by the Government and in order to emphasize the peculiar problems of reorganization with which the Government is confronted.

The writer is indebted to the general editor of the present series, Mr. W. F. Willoughby, not only for his careful revision

of the manuscript, but for many helpful suggestions with regard to the substance of the volume. The publication by Mr. Willoughby of a study of "Government Organization in War Time and After" made it possible for the writer to omit numerous details of War Administration in the United States and to concentrate upon the legal and political aspects of the problem. Needless to say the general editor is not responsible for the views expressed, in many cases somewhat tentatively, in the chapters dealing with problems of reconstruction.

C. G. F.

BRYN MAWR.

April, 1920.

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PART I

POLITICAL IDEALS AND THE DEMANDS OF WAR

POLITICAL SYSTEMS IN TRANSITION

CHAPTER I

INTRODUCTION. WAR A TEST OF DEMOCRATIC GOVERNMENT

The war a means of political education. The four years of the World War were not only an education for the people of all nations in questions of foreign policy and international relationships, but a means of bringing the great masses of each country into touch with the domestic institutions of other countries and making them acquainted with forms of government hitherto unknown to them. If the Triple Alliance and the Triple Entente came to be freely discussed in the daily papers, if Belgium and Serbia came to be household words, and Czechoslovakia a name which even the unlearned might spell, no less striking a growth took place in our popular understanding of absolute and constitutional monarchies, of parliaments and cabinets, of federal and unitary states, and of political parties and party control. Many to whom the Government of Germany meant no more than the person of the Kaiser were initiated into the functions of the Reichstag and the Bundesrat, and were made to understand how a government can have many of the outward features of a democracy and yet be in its essential character an autocracy. Many to whom the existence of a king as head of the state indicated a degree of autocracy in the government came to learn that constitutional monarchs may have so little actual political authority as to be no more than figure heads, symbolizing the unity and traditions of the state, but powerless to affect its policies. Parliaments and cabinets

became as familiar as a Congress and President, and the rise and fall of governments in response to parliamentary votes of want of confidence as natural an event as the fixed terms of our own representatives. Even the technicalities of party politics came to be understood in some measure, and discussions were common of coalition ministries and of the radical and moderate wings of republican and of socialist groups.

An opportunity to test democratic government. While the war thus enlarged the range of our political knowledge, it also enabled us to make comparisons at every turn between our own and other governments, and to estimate the value of our own institutions in the light of the experience of other nations with different forms of political organization. Primarily we matched democracy against autocracy, both in respect to the ideals of each form of government and in respect to the power of each to command the forces of a united nation to accomplish its purposes. Were German political ideals, apart from the policies that were being pursued by the German Government, worthy to be compared with those of the Allied powers? How far were these ideals responsible for the practical unanimity with which the German people supported their government? What was the peculiar character of the political organization which made Germany so powerful on the field of battle? Was that organization necessarily autocratic or only accidentally so? But while marking these contrasts, we at the same time made comparisons between the democratic nations themselves, if not in respect to national ideals, at least in respect to the relative advantages and disadvantages of their particular forms of democratic government. Was the cabinet system of government, which made the executive department responsible to the legislative and enabled the latter to enforce its demand for an efficient administration, essentially better than the system of elected officials whose office was secure until the normal expiration of its fixed term? Was the unity of government which prevailed in Great Britain and France an advantage in time of war as against the federal system which prevailed in

the United States and Germany? The answers to these and other questions were reached not by theoretical discussion, but by the actual observation of concrete conditions. The public at large went to school, as it were, in that most valuable of all training schools—the experimental laboratory of practical politics.

The war a conflict of political ideals. The task of the historian of the World War in attempting to estimate how far the political ideals of each state contributed to a justification of its objects in the war and to the creation of the spirit of national unity which it brought to the support of those objects will not be an easy one. It is a simple solution to quote a variety of German authors and show that the German state was built upon the principle that the state is the embodiment of force, and that such force or might is its own justification and may be resorted to when necessary to further national development. On the other hand, it can be shown that both the British and the French political traditions repudiate any such worship of the state, and insist that governments are bound by the same moral obligations by which the individual citizens of the state are bound. But the issue lies much deeper, and no just conclusions can be reached by a comparison of political ideals without at the same time taking into account the economic forces at work in creating the rivalry of nations. On both sides there had been for a generation the sharpest competition for the control of foreign markets and of the raw materials of industry. A vital factor in the situation, moreover, was the anarchical character of the whole international system, which threw upon each state the duty of protecting its national rights by its own armed force. But while these conditions of economic rivalry and of international lawlessness provided the motive and the occasion for the outbreak of the war, it nevertheless remains true that the political ideals of Germany played an important part in determining its response to the economic motive and in leading it to precipitate the war which international law had done too little to prevent. On the other hand, while

self-defense was undoubtedly the ulterior motive leading the British Government to take part in the war, there is no question but that the political ideals of self-government in Great Britain, and the conception of national morality as of the same value as individual morality, made it possible for the government to obtain the support of a large part of the body politic which might otherwise have been for the time indifferent. Those who failed to see the menace to Great Britain of a triumphant Germany responded to the appeal to vindicate their pledged word to defend the integrity of Belgium. This conflict of national ideals became all the more marked when the proposal was made in December, 1916, that the powers at war should state openly the terms upon which they were ready to conclude peace.¹

The case of the United States was somewhat different. There was no immediate danger to its territory in consequence of a German victory as in the case of Great Britain. The proclamation of neutrality in August, 1914, was but the expression of the traditional attitude of the United States towards the wars of Europe. But the breach of faith by Germany in invading Belgium and the methods of military occupation by which it was accompanied could not but have their effect in awakening sympathy for the cause of the Allies. This sympathy grew with each month of the war, but it is doubtful whether it would have been of itself sufficient to make the United States depart from its neutral position had not the German Government committed direct wrongs against us and forced a declaration of war. Once war was declared, upon whatever technical grounds, the conflict between the two countries became at once a conflict of political ideals. "The world must be made safe for democracy." This phrase was singled out from the address of the President to Congress and became

¹ No mention is made of France because the imperative necessity of self-defense left no room for the influence of political ideals in determining the response of her people to the war. In Russia the unquestioning loyalty of the masses responded blindly to the appeal to come to the aid of their Slavic brethren in Serbia.

thenceforth, as it were, the national battle cry. It is doubtful whether many of those who came from factory and farm in response to the call to arms could have defined in any precise manner the meaning of those words; but one and all felt as by instinct that they symbolized the vital issue between Germany and the United States. The principles of political freedom which were part of the original inheritance of the United States, and which had taken shape in its constitution and in its legal traditions, were emphasized and reiterated in order to make clear the contrast with the irresponsible government of Germany and its autocratic military system. If the deeds of the enemy were doubly evil because of evil principles offered in defense of them, then it was of fundamental importance to set forth the higher standard of conduct demanded by the principles of democracy.

Democracy and efficient government. If the war involved in principle a conflict of political ideals, it was in actual reality a conflict of organized peoples. The chief military lesson of the war is said to be the fact that war is no longer merely a contest between the armed forces of the two states, but has come to be a struggle between the citizen body of one nation and that of another. The fighting strength of an army is now seen to depend upon the industrial resources of the nation, upon the extent of its food supplies, upon the directive ability which can be enlisted to coordinate these materials, and upon those moral qualities of the people which determine the extent of the sacrifices they will be willing to make to the cause. In consequence, the fundamental political problem raised by the war was the question of the efficiency of a democratic government when faced with the necessity of bringing all the forces of the nation to bear upon the single object of overcoming the enemy. In times of peace democracy may be willing to sacrifice some measure of efficiency for the sake of the moral advantages attaching to self-government. Efficiency is not the primary object of government in a democracy. Law and order must, indeed, be maintained and certain positive bene-

fits be secured to the citizen body; but democracy may well be content to put up with a limited degree of mismanagement and extravagance on the part of incompetent officials for the sake of the educational advantages involved in the electoral process. Liberty and individual initiative are to be regarded as positive goods, to be given presumptive right of way except where there is clear need of a restriction upon them for the common good. As a result, democracy, especially in the United States, has often denied itself a fuller measure of the advantages of improved organization lest in seeking to obtain them it should unduly curtail that individual initiative and freedom of action to which it gives first place.¹

Efficiency in time of war. But though democracy may be willing to sacrifice efficiency to self-government in time of peace, it cannot do so in time of war. The prime object of government is then the preservation of the national existence with all that it connotes indirectly for the good of the individual citizen. For the sake of this high purpose it may be necessary to subordinate democracy to efficiency and to suspend temporarily those very principles of liberty in the individual which the war is fought to maintain for the nation as a whole. The question thus arises: how did democracy compare with autocracy in meeting the problem of organizing the nation and forcing its citizen body to do that which they were not accustomed by long training to do? Was the transition from a government in which the principles of democracy had priority to one in which efficiency had priority accomplished without serious loss? If autocracy had an advantage in respect to preparation and rapidity of attack, was this initial advantage overcome in due time by democracy exhibiting greater stay-

¹ It will not be inferred, of course, that it is not possible to secure greater efficiency in the government of a democracy without loss of liberty. Much of the wastefulness and inefficiency in American government is due to indifference on the part of the public and to lack of energy in seeking an improved system. A public indifferent to the acts of its elected officials may be in actual fact as little self-governing as a community governed by the appointees of a czar.

ing qualities in its people? In respect to the organization of government as a fighting machine, what special difficulties confronted the United States at its entrance into the war by reason of its more rigid and decentralized form of constitutional government? Were these difficulties as great, or greater, in the case of Great Britain with its unitary parliament and cabinet form of government? What changes were effected in the Government of the United States to enable it to meet the demands of the war in a more adequate manner?

Value of the tests of war for the work of reconstruction.

The answers to these and other questions raised in the attempt of a democratic government to adapt itself to a war of exhaustion will throw much light upon the inherent strength and weaknesses of the American Government, and will enable us to distinguish between what is of permanent and intrinsic value in our form of government and the accidental corruption and mismanagement which have at times accompanied its practical working. We shall find that in some respects our ideals themselves have been enlarged by the war and that in other respects they have been, temporarily it is to be hoped, contracted. Parts of the machinery of our government will be found to have worked with a degree of smoothness and power which is above criticism; while other parts have exhibited defects which it is important for us to remedy. Is it possible to attain greater efficiency in our government without sacrifice of those elements of democracy which are indispensable? In attempting to view all sides of the question the experience of other governments has been drawn upon in the following pages wherever the problem involved was one common to all states. Even in their downfall the states of Germany, Austria-Hungary, and Russia offer valuable material for comparison. The experience of Great Britain in particular, as being most nearly like the United States in its political traditions and industrial organization, has been described at some length, and it will be found that there is much in common in the problems confronting the two countries. The period of reconstruction

which we have now entered upon is making demands upon us to prove the value of our cherished traditions. Such of them as cannot meet the needs of the new era must be discarded as outworn. In this delicate task of breaking here and there with the customs of the past, the lessons of the war will do much to guide us in reaching a sound decision.

CHAPTER II

THE CONSTITUTIONS OF THE GREAT NATIONS ON THE EVE OF THE WORLD WAR

Political theory a part of the constitution. It is clear from the questions raised in the preceding chapter that we should be missing one of the chief lessons of the war for the development of political institutions if we were to confine our attention merely to the structural changes which it brought about in the governments that were involved in it. It needs only a superficial study of the problem of government to observe that a government is something more than the mere organization of the departments or bodies through which laws are enacted and carried into effect. As a recent writer has said: "It is of the essence of all conscious government that its structure is planned or contrived on some theory of operation, or again involves some theory as to the nature of man and the nature of government."¹ In consequence it is a common admonition that the institutions of a country must be studied in the light of the political principles upon which they were founded and the traditions which have guided their development. According to the spirit that animates them the same set of political institutions may be an instrument of freedom in one country and an instrument of oppression in another. A government founded upon principles of democracy may, indeed, at times lose sight of those principles in the turmoil of party conflicts to which popular government at times gives rise; it may be forced frankly to abandon some of them in time of great emergency; but the constant presence of those principles in the background of the political life of the country protects the people against a permanent encroachment upon their liberties, and insures a re-

¹ A. G. Sedgwick, "The Democratic Mistake," p. 30.

turn to normal constitutional relations when the exceptional conditions disappear. This recognition of political theory as a part of the constitution is particularly important in the United States, whose government was built up upon complex foundations deliberately planned in order to meet abstract conceptions as well as concrete conditions. In the following sketch of the constitutions of the United States, Great Britain, France, Germany, and Russia, it will be possible to present only the dominant principles underlying their constitutions, with reference in each instance to those which were more directly affected by the changes brought about by the war.

Individual character of democracy in different countries. The individual character of the theory of democracy in the United States and in the leading states of Europe is as marked as is the individuality of their divergent forms of government. Each nation has seen the light from its own point of vantage and has struggled towards it by methods dictated by its own distinct national traits. The unity of purpose and of action which dominated the governments of the Allied powers during the last year of the conflict was interpreted by many as indicating a close similarity of national ideals. A war of democracy against autocracy seemed to imply a common conception of democracy among its champions. But in the year that has elapsed since the signing of the armistice it has become more evident that national characteristics have been but little changed, and that each of the nations will continue to work out its own conception of free government in accordance with its historic traditions.¹ The reconciliation between freedom and law, between individual rights and justice, which marks the triumph of modern democratic government, is not to be brought about by imposing upon one country the political institutions of another. Freedom is a relative term, and must be judged in the light of the aspirations of a particular people. Law is an artificial restraint which has developed into a highly complex

¹ The point is developed in detail in a recent volume on "Reconstruction and National Life," by C. F. Lavell.

system adjusted to the needs of each country by the traditions of centuries. Individual rights and general justice must be viewed in the light of changing economic conditions as well as of political status. But while this individuality of national development is an undoubted fact, it is also true that the experience of one country in meeting its own peculiar problems may be of great service to another. American democracy has its weaknesses as well as its strength; and while it held aloft the torch of free government to Europe during the nineteenth century, it has lessons of its own to learn from the Europe of the twentieth century. A wise conservatism will be led by the success of new methods in other countries to consider a like reform in its own government; a wise radicalism will be led by the failure of new methods in other countries to question the practical worth of similar proposals of its own. These comparisons between the democracy of the old world and that of the new came to have greater value when the rigorous test of the war revealed flaws in the machinery of the several governments which might otherwise have remained unnoticed. It will help us, therefore, to interpret the characteristic features of American democracy and to understand the significance of the changes in its political institutions made necessary by the war, if, within the limits of space allowed, the underlying principles of government in the leading countries be placed in contrast, both in respect to the theory involved and in respect to the practical application of the theory in the working machinery of the state.

Theory of democracy in the United States. Looking first at democracy as a theory, distinct from the form of political organization by which its adherents sought to give expression to that ideal, we may, at the risk of covering familiar ground, point out some of the more fundamental principles by which the people of the United States have been guided in the course of their development down to the eve of the World War. When the American colonies found themselves faced with the necessity of justifying the radical action they were taking in

separating themselves from their mother country they put forth a document which was destined to mark a new epoch in the history of democratic government. The Declaration of Independence of 1776 contained a theory of government which has become such a commonplace in the modern world that it is difficult for us to realize that it could have ever been considered a radical doctrine. Governments are instituted among men in order to secure certain unalienable rights with which men are endowed by their Creator and which therefore belong to men prior to the establishment of governments. In consequence governments derive their just powers only from the consent of the governed.

Self-government of citizens and self-determination of groups. Two distinct political principles are here involved: in the first place self-government is asserted as a right belonging to the citizens of the State as such. *Good* government had long been recognized, by political writers of every school, as an inherent right of man; but good government did not necessarily imply government by rulers of one's own choice. Underlying this right of self-government is the theory that the relationship between the members of the State and their Government is purely contractual. Governments are the agents of the people for the performance of the functions of government, and only in so far as they fulfil the duties assigned to them have they any claim upon the support of the people. From another point of view governments are trustees to whom the public welfare and the public funds have been entrusted, to be administered for the benefit of the citizens at large.¹

In the second place the Declaration of Independence asserted the principle that not only may the people of the State as an entirety change their agents of government, but a definite

¹ These ideas were, indeed, not new ones, even in 1776; they had been clearly stated by the philosopher Locke in 1690 and by Milton and others before him; but they did not become a practical program of political action until the former colonies, by successful revolution, won their admission into the family of nations.

group or community of people may, under certain circumstances, sever themselves from the larger State of which they constitute a part. This latter principle followed as a logical corollary of the former, and it offered a new theoretical justification for the age-old struggle of nationalities for an independent statehood. The world had long been familiar with the claim of national groups to freedom from foreign aggression, and the moral right of revolution in such cases had been freely asserted by philosophers and statesmen. The new declaration announced to rulers that self-government was so far the right of man that even colonies which were of the same blood and language as the mother country and whose legal traditions were the same might throw off the government of the mother country and set up a separate government of their own. The conditions justifying such action were clearly set forth. Whenever any form of government becomes destructive of the ends for which it was instituted, "it is the right of the People to alter or to abolish it, and to institute new Government" for the better attainment of those ends. Naturally such a change of governments should not be made "for light and transient causes," but as an alternative to continued misgovernment it became not only a right but a duty.

Development of the democratic theory. The Declaration of Independence was a document of revolution. Taken apart from the immediate purpose which those who issued it had in mind, it set forth a theory of equality which was susceptible of the most radical interpretation, and conservative statesmen looked with suspicion upon what they feared might be the dawn of an age of anarchy. In some respects the Revolution was not so much a war between the colonies and the mother country as a struggle between classes of society. For many of the separate governments under which the colonists had been living were far from being based upon an equality of political privileges or an equality of economic opportunity. Not a few, therefore, of the leaders who gave the Declaration their support as a program of political action against Great

Britain did not consider themselves inconsistent in endeavoring to maintain a limited suffrage based upon property qualifications and in seeking to keep the reins of government in the hands of the old aristocracy in control before the Revolution. Owners of slaves rejected altogether the application of the theory to those whom they held at law to be not persons but property. The reaction against ultra-democratic theory became all the more marked when the conditions following the Revolution gave evidence of the excesses to which the new doctrines were leading in many quarters. But as decade succeeded decade the idea of popular government strengthened its hold upon the country and the forces of conservatism were driven more and more into the background. The opening up of the public lands to settlement in the Middle West led naturally to the breakdown of the property restrictions placed upon suffrage in some of the older eastern States, and the triumph of Jacksonian democracy in 1828 soon disposed of the tradition that the exercise of political power was the prerogative of an exclusive group of the educated and propertied classes. The close of the Civil War showed the progress that had been made. The Gettysburg address reaffirmed the ideal of "government of the people, by the people, and for the people"; the 13th Amendment to the Constitution wiped out the anachronism of a subject race; while the 14th Amendment secured the predominance of National citizenship over State citizenship, and placed the protection of the fundamental rights of life, liberty, and property under the control of the Federal Government. One outstanding issue still remained unsettled on the eve of the World War. Is the suffrage by which the law is made and policies are determined to be considered as a right or as a privilege of citizenship? And if a privilege of citizenship, is the discrimination against sex, irrespective of qualifications or of consent, compatible with the theory of equality which lies at the foundations of democracy?

Moral character of the democratic state. The theory that governments are but the agents of the people and are instituted

to secure certain rights not possessed by the people as a gift from the government, but held by them prior to its creation, has as its corollary the principle that the State, of which the government is but the outward expression, exists not for itself but for the benefit of the individuals who compose it. The sole aim and object of the State is to act as a means by which the citizen body may obtain for themselves collectively and individually certain definite advantages not otherwise within their reach. Hence the personality which the State possesses cannot endow it with attributes which are contrary to the welfare of the individual units who compose the body politic. What rights, therefore, the State may claim, it claims merely as the trustee of the rights of the people as an organized group, and at the same time it must assume the obligations incumbent upon its members in the same capacity. In consequence it has always been part of the American theory of democracy that the same moral code which was accepted by the citizen body as individuals should be binding upon the State as a whole, so that, for example, a treaty made by the Government with a foreign State should be judged by the same standard and be regarded as of the same binding force as a contract of a similar nature between two citizens. Doubtless this belief in the identity of the moral standards applicable to the conduct of the State and of individuals has been rather a subconscious inference from the general theory of democratic government than a definitely formulated rule of conduct; and no one would claim that the actual foreign policies of the nation have always conformed to that ideal. But within these limitations it still remains true that no justification for the evasion of its obligations would conceivably be offered by the American Government which denied the obligation of the State to be bound by the rules of individual moral conduct.¹

¹ The point is strikingly developed in an address of Senator Root before the Senate in favor of the repeal of the exemption of American coastwise vessels from payment of tolls for the use of the Panama Canal. The obligations of honor in a democracy are set forth as

American political institutions. Turning from the discussion of American democracy in its aspects as a political ideal to the machinery of government which has been created in the attempt to realize that ideal, we find ourselves in the presence of complex institutions which at first sight seem inconsistent with the fundamental principles expressed in the Declaration of Independence. The simple faith in democracy which characterizes the great document of revolution is seen to be limited and restrained by the organization through which it was made a living reality. These limitations and restraints were primarily due, in so far as the United States as a whole is concerned, to the difficulty of creating a Federal State which should at the same time represent the "more perfect union" believed necessary in 1787, and yet not encroach more than was necessary upon the local self-governing powers of the several States. They were also due to the formal character of the written document in which the agreement of federation was drawn up; and again they were due to the complex nature of the agencies provided for the Federal Government. It has long been held by many critics that these limitations and restrictions have in part outworn their usefulness, and have ceased to be suited to the conditions and needs of a later generation. This belief has acquired new strength as a result of the severe test through which the Federal Government was put during the war. The nature of this test we shall see in a subsequent chapter. We may here briefly examine the machinery to which the test was applied.

The powers of the Federal Government. The division of power between the "Union" and the States was not made in accordance with an abstract theory of government, but in response to the imperative demands of the times. The States which had made but slight concessions of governing power to the central Congress under the earlier Articles of Confederation found from stern experience that a fuller measure of overweighing the material losses involved. "Addresses on International Subjects," p. 207.

power must be granted if the principle of unity was to prevail against the centrifugal forces of the thirteen States each retaining "its sovereignty, freedom, and independence." The delegation of power by the separate States to the government of the Union was made reluctantly, not generously. The Federal Government was entrusted with power over matters in which unity of action was deemed essential, and among them the power to declare war and to raise and support armies; while on the other hand the States retained the powers of local self-government and in general all other powers not expressly or impliedly delegated to the central Federal Government. Little more was conceded than the minimum regarded as necessary to overcome the defects of the existing confederation, although that minimum did, as the event proved, constitute the foundation of what was ultimately to become a single national State. For whatever was the original intention of the framers of the Constitution and of the State conventions which ratified it, time and the inevitable demands of territorial expansion led the government of the Union to assume an ever-widening power. Formal amendments had been provided for, but it was not foreseen that no document can be so rigid as to resist the informal amendments imposed by a growing nation. Nor was it foreseen that the delays incident to the amending process, while of value in normal times in securing the necessary deliberation upon the questions at issue, might prove a serious obstacle to the protection of the nation in cases where prompt action was essential. The crisis of secession called for the assumption by the Federal Government of powers which the letter of the Constitution completely failed to justify; but the urgent needs of the situation silenced the dissenting voices, and the Federal Government vindicated its self-conferred authority. The years succeeding the Civil War were years of unprecedented industrial growth, and the boundaries of local state Government were crossed at every point by the highways of commercial and social intercourse. Gradually the Federal Government enlarged its control, though still keeping within

the letter of the Constitution. Then again, the outbreak of a war calling for the concentration of the resources of the entire nation became the occasion for the extension of the range of federal authority beyond bounds hitherto imagined.

The nature of a written constitution. Restrictions upon the agents of government. Both in the case of the Federal Government and of the separate component States the origin and legal character of the agencies of government are to be found in a definite document adopted by the people as the foundation of their political organization. These written constitutions, being the first of their kind in modern history, have had an influence far beyond the borders of the country in which they originated. They represent the conscious attempt of democracy not only to provide for itself a specific form of government, but to place restrictions both upon its own agents of government and upon the normal majorities by which elections are won and policies dictated. With respect to the agencies of government the function of a constitution is not only to give stability to the organization of the government, by making it a matter of considerable delay before changes can be effected, but to keep the officers of the government, when exercising their functions, within the particular field assigned to them. The framers of our early constitutions were familiar with the human weakness which leads those who have power to seek to acquire more. They therefore believed that the control over the agents of government by means of regular elections was not sufficient, and they sought to restrain them by placing a definite limitation upon their activities. The idea is best expressed in the oft-quoted statement from the Massachusetts Constitution of 1780, that the object to be attained was "a government of laws not of men." This means that no act of an officer of the government is valid unless it can be justified by a general or specific authority conferred upon such officer by the constitution. The decision in a given instance whether the legislative and executive agents of the government have exceeded the powers conferred upon them by the constitution

is, in the United States, entrusted to the judicial department of the government.

The principle of checks and balances. But the unique feature of the Federal Constitution which gives it perhaps its distinctive character among other constitutions is the provision which it makes for "checks and balances" in the organization of the government. This principle, while introduced by conservative members of the Constitutional Convention of 1787 as a means of offsetting the dangers of a turbulent and fickle democracy, was accepted by radicals as promising to prove an equal protection against autocratic control. In accordance with it, the Convention assigned the distinct functions of government, legislative, executive, and judicial, to separate departments, each acting to a greater or less degree independently of the other. By dividing the legislature into two houses of unequal terms of two and six years, by electing one-third of the members of the Senate every two years, by making the President independent of Congress and providing a term of office equal to two terms of the lower house, and by creating an appointive judiciary empowered to interpret the Constitution and the laws made in pursuance of it, the Constitution makes it practically impossible to bring about any sudden change in the policies of the Government.¹ The hasty and ill-considered demands of even a majority of the electorate cannot at once be registered as laws if opposed by a determined minority. It is true that the separation of the powers of government is not complete: the President is given a veto over legislation as well as the right to recommend measures for adoption. Congress may not only make laws but may prescribe regulations for the administrative departments through which the President enforces the laws, and the Senate can withhold its consent from appointments to office made by the President. But

¹ An excellent illustration of the effect of different terms of office for different bodies is to be seen in the continuance in office of President Wilson after his policies had by implication (as far as can be judged from so doubtful a procedure as an election in which numerous issues were involved) been repudiated in the elections of 1918.

with these and other lesser exceptions, designed to emphasize the primary check obtained by separation, the departments perform their appointed functions each independently of the other.

Criticism of the principle. The principle of checks and balances as exemplified in the Constitution of the United States was an object of criticism long before the crisis of the war called it more seriously into question. Few, indeed, of those who still had faith in it would go so far as to say with Madison that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or of many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."¹ It was generally recognized that popular control over the government could be rendered sufficiently effective to prevent tyranny or oppression even where, as in the case of parliamentary government through a responsible body of ministers, the powers of government are unified under a single control. With democracy firmly seated in the saddle, as it was by the close of the nineteenth century, why should a system be perpetuated which tended to prevent democracy from accomplishing its own will promptly instead of after self-imposed delays. With both President and Congress subject to the same popular control, why should they be forced to work more or less in isolation when efficiency clearly called for cooperation? Why should administrative departments perform their duties under rules prescribed by Congress, but be responsible to the President for the effective discharge of their duties. Why should Congress appropriate money and prescribe regulations for the departments without being obliged first to obtain a proper understanding of the needs of the departments? Obviously there was no advantage in continuing a system which divided responsibility and created duplications of functions and consequent friction and confusion. Here again the war opened the eyes of the public to an understanding of conditions which for want of an impressive

¹ "The Federalist," No. 47.

lesson had been allowed to continue much too long. It was one thing to accept inefficiency as an inconvenient result of a system of government which had been in operation so long that it was easier to continue with it at some additional cost than to undertake the necessary changes; it was quite another thing to find that in the presence of the demands of a World War inefficiency was in a sense constitutionally imposed upon us.

The protection of individual rights. Both the Federal Constitution and the separate state Constitutions contain guarantees that certain fundamental rights of the citizen body shall not be encroached upon by the Government. In respect to the legal effect of these guarantees it need only be observed that their purpose was to prevent arbitrary action by the officers of the Government, not to permit the unrestricted enjoyment of those rights contrary to the welfare of the people as a whole. The purpose of the guarantee of freedom of speech and of the press was not to make possible a license in the expression of opinions which might be hurtful either to individuals or to the public at large. The 5th and 14th amendments to the Federal Constitution, requiring of both the federal and the several state governments that "due process of law" shall be followed in any proceeding against the life, liberty, or property of an individual, are a standing check upon arbitrary governmental action; but in neither case do they prevent the passage of laws by which both liberty and property are subjected to restrictions for the common good. The guarantees are, therefore, not absolute but qualified, and the extent of their enjoyment must be determined in the individual case by balancing the presumptive right of the individual against the possible injury to others. In times of peace this issue is frequently raised in connection with the exercise by the State of its "police power" to protect the public welfare. In time of war the issue becomes one of denying individual rights where their exercise might endanger the safety of the State. Whether in the recent war the restrictions imposed were in ex-

cess of the need is a question to be answered in a subsequent chapter.¹

Similarity of war problems in Great Britain and in the United States. Many of the problems with which the United States was confronted as the result of its entrance into the war, both in respect to the organization of its government and in respect to the relation of the individual to the State, were closely paralleled by similar problems in Great Britain. To a large extent the traditions of free government in the United States are an inheritance from the former mother country. New shoots have been engrafted upon the original stock, new applications have been made of old principles, but the fundamental conceptions of freedom and justice in both countries have remained largely the same. Due to external conditions of colonial settlement and of national expansion the United States has departed widely from the original model in respect to the organization of its government; but even here there are points of mutual contact. In consequence, the experience of Great Britain in adjusting its political principles and its governmental machinery to the demands of the war not only proved to be of immediate service in helping the United States to meet a similar emergency, but furnished many valuable opportunities of comparison in respect to the efficiency of the two different systems of government. The experience of Great Britain in making this adjustment belongs to a subsequent chapter, but the lessons for the United States will become more evident if a brief reference be made here to the principles underlying British democracy and to the foundations of its political structure.

Democracy in Great Britain. Representative government. The foundations of British democracy can be traced far back into its Anglo-Saxon past. The walls of the edifice were erected but slowly from the thirteenth century onwards, part being added upon part on successive occasions of political revolt. The nineteenth century saw the central building completed.

¹ See below, pp. 168-176.

There are still important wings to be added before the structure can be said to be finished as a whole. The story is a long one and is marked by the parallel development of two different principles, the right of the individual citizen to a distinct sphere of personal liberty and the right of the individual citizen to take part in the business of government. The latter right has been, until recent years, of far less importance to the average Englishman than the former. Magna Charta was a document of liberty, but not a document of democracy. It contained guarantees against oppression of the people by the king, but it did not give them a share in the government. At the time of its adoption the important question was not the desire of the citizen body to control the destinies of the State, but the desire to be protected against arbitrary and despotic acts in the affairs of their daily lives. In the same century a national Parliament was established, one branch of which admitted the knights of the shires and the burghers of the towns to representation in an assembly of very limited powers. In the succeeding centuries the powers of Parliament grew in extent, but its composition became more and more exclusive. Franchise qualifications and the manipulation of seats by the Government narrowed the governing body to the properties classes. The Bill of Rights, which marks the final stage of the struggle against autocracy, was the demand of an aristocracy for its lost privileges, not of a democracy for its rights. At the time of the American Revolution Parliament was elected by so restricted a suffrage that it was in no sense representative of the great masses of the people. It was not until the act of 1832 that the suffrage was extended to the great middle classes, and not until the acts of 1867 and 1884 that the laboring classes in town and country were included. As things stood in 1914 the ideal of British democracy closely approximated to the American ideal in recognizing the complete right of a majority of the electorate to control the Government through their representatives in Parliament. It remained for the war to hasten the passage of the Representation of the People Act of 1918,

which extended the suffrage to women and removed some of the outworn electoral privileges attached to the possession of property.

The rights of citizens. But if the popular will as a positive force in controlling the Government was late in obtaining its present recognition, the right of the individual to a sphere of personal liberty as against the encroachment of the Government was successfully asserted from the start. Magna Charta is best known to us by the clause which calls for the reinstatement of the old "law of the land" which had been taking shape for several centuries. The right to trial by jury, the customary forms of procedure, equality before the law, the right to be secure in one's person and one's property against arbitrary restraints,—these were the aspects of free government which came to seem essential in the succeeding years, and which still to a large extent dominate the thought of British democracy. Freedom of speech and of the press is less explicitly laid down in the law of Great Britain than in that of the United States or of France, but with exceptions based upon protection against libel and against treason, it is none the less securely maintained. It is, as it were, an implied right, which has needed no formal guarantee from the Government, yet which can be restrained by any jury when circumstances of libel or treason demand it. Such also is the right of assembly, which is no more than the right of citizens to do as a group what they may do individually. As Professor Dicey has pointed out, these traditional rights of British democracy are inferences from the general "rule of law" which is one of the dominant characteristics of the British Constitution. Parliament may be corrupt; the courts may decide unjustly in individual cases; but no one may question the principle of the supremacy of the law as against arbitrary acts, or the principle of the equal application of the law to all without discrimination. Our present interest in these traditional rights arises from the fact that the imperative demands of a World War forced the Government to deny them in numerous instances, and Englishmen looked on

with mingled feelings of resentment and resignation at the subordination of their domestic liberties to the safety of the nation. But what was more serious still, even the old "rule of law" was obliged to yield in part to the emergency, and we are now witnessing manifestations of isolated "lawlessness" which, though due to other causes than the war, is becoming a serious menace to the future welfare of British democracy. At the same time the question is being asked in Great Britain whether there can be true democracy under an economic system which has kept the land from the people, and, as in the United States, under an industrial system in which the workers have no control over the conditions under which they must live.

The British Constitution. If American political institutions are complex in their number and inter-relations, they are at least the product of a definite act of the popular will and are based upon provisions specifically laid down in written constitutions. By contrast, British political institutions, while simpler in their actual working mechanism, rest upon a far more intangible constitutional basis. No single written instrument embodies the fundamental law from which the agents of the Government derive their powers. If a question arises as to the authority upon which a given act of the Government is based, it cannot be answered by reference to the text of an original grant of the people. There is, indeed, a constitution, but it is embodied in a wide variety of important documents drawn up at times of political crisis, in statutes of Parliament passed under circumstances which have given them a special authority and permanence, in other statutes of no special political importance, and in customs and traditions which have obtained recognition in the decisions of the courts. Magna Charta, the Petition of Right, the Bill of Rights, mark certain stages in the development of the British Constitution, but they are far from being an embodiment of it. From time to time Parliament has pronounced definitively upon certain pressing issues, such as the extension of the suffrage during the nineteenth century, and its decision has acquired for the time being

the force of a constitutional enactment. Such statutes are valid in their own right, and there is no higher law by which their authority need be tested. But in addition to these tangible evidences of fundamental law, there is the large body of customs and traditions which have been built up during the course of centuries and which represent the adaptation of the fundamental law to the needs of the times without the procedure of a formal amendment. Those which relate to the rights of the individual in his relation to the State are to be found in a long line of judicial decisions which have the authority of written rules of law. No position of priority, however, is accorded them by reason of their long duration or fundamental character, should acts of Parliament be passed superseding them. Those which relate to the organization of the Government and its functions, such as the dependence of the Cabinet upon the House of Commons, exist in the form of conventional understandings which have practically the force of law, but which could be set aside by Parliament without raising any issue of which the courts of the country could take jurisdiction.

Elastic character of the British Constitution. It will be seen at once that the British Constitution is far more elastic than that of the United States. Changes in the British Constitution can be brought about by the same procedure which attends the passage of an ordinary law, and constitutional amendments are in fact indistinguishable from ordinary laws except in respect to their subject-matter. What does an Englishman mean, then, when he protests against a law as being an unconstitutional invasion of his private rights? He means either that the law in question encroaches upon a domain which by long custom has been regarded as outside the sphere of governmental interference, or that the law regulates those rights in a manner fundamentally different from that hitherto followed. But as Parliament is omnipotent, that is to say, as there is no jurisdiction on the part of the courts to declare an act of Parliament null and void, the injured party has no

appeal other than to his representative in Parliament and to the public opinion of his fellow-citizens who are similarly affected by the law. Under such a constitution, and with the supreme power of the whole State centralized in one legislative body, it can readily be seen how easy it was for the British Government to adjust itself to the changes required by the war. The most drastic amendments to the fundamental law could be made without raising the issue of their legal validity. On the other hand the war raised the question whether there was sufficient protection for the personal and property rights of the citizen, when an act of Parliament could without more ado set aside the customs and traditions of centuries.

Popular control of the Government. It is frequently said that the British Government is more democratic than the Government of the United States in that it is more directly responsive to changes in the popular will. The Cabinet represents the majority in Parliament and is dependent upon that majority for its continuance in office. Should the majority in Parliament become dissatisfied with the policies of the Cabinet, or should one or more of the groups which make up the majority withdraw its support, the Cabinet must resign in favor of a new group of leaders possessing the confidence of Parliament. Assuming that Parliament really represents the popular will, there is here a much more direct control over the policies of the Government than is possible in the case of a government whose officers are elected for fixed terms. Moreover, by a sort of reverse process, it is possible for the Cabinet to decide that a majority in Parliament does not actually represent the latest expression of the popular will, and it may in consequence dissolve Parliament and order a new election for the purpose of ascertaining that will more accurately. This form of national referendum had come by the close of the nineteenth century to be regarded as the proper procedure when important measures were brought forward which were not in the minds of the electorate when the existing members of Parliament were elected. The value of the practice may be seen by a compar-

ison with the situation which developed in the United States after the elections of 1916, when a President and Congress, elected in part because they would keep the country out of war, felt obliged to declare war; and again after the elections of 1918, when an administration which had lost its support in Congress continued to direct the foreign policies of the country. On the other hand it was a common enough criticism in the British Liberal press before the war that cabinet government was not in all respects democratic. There was a notable absence of discussion in Parliament, with the result that while the responsibility of the Cabinet to the people was sufficiently direct in respect to the important issues which figured in the headlines of the daily press, the Cabinet was practically an irresponsible body in respect to the less important, or rather the less conspicuous, measures, and in respect to the detailed administration of the law. The governing class, it was said, was strongly entrenched in the Cabinet, and the steady gain in the power of the Cabinet at the expense of Parliament had reduced the British Government at times to the status of an oligarchy rather than of a democracy. These grounds of criticism were greatly increased as the result of the new functions assumed by the Cabinet during the war.¹

Ideal of French democracy. Unlike its steady growth in Great Britain, the development of democracy in France has proceeded as a series of cross-currents, checking one another by their contact at sharp angles, but in the resultant of their forces moving steadily forward. Popular sovereignty as a theory was promulgated in France by Rousseau even before Jefferson, himself under the influence of Rousseau, drew up the American Declaration of Independence. With the outbreak of the French Revolution came the literal adoption of the theory, with the most radical practical applications as the Revolution progressed. Reactions followed, but through all the period of conservative constitutionalism the ideals of "liberty, equality, and fraternity" remained a force in the

¹ See below, pp. 81-86.

background, ready to exert itself in emergencies. Each minor revolution, with its installation of a new dynasty or a new republic, served to define anew the rights of the people. The triumph of democracy seemed assured in 1848, but again there was a set-back and for two decades democracy was defeated by an appeal to a flattering imperialism. Defeat in war revived the demand for republican institutions, and after four years of wavering decision the Republic was finally established in 1875, and responsible government on a basis of manhood suffrage marked the final stage in the changing fortunes of French democracy. The supremacy of "the general will" as the legal basis of the State, accompanied by the recognition of definite moral limitations upon that will in the interest of maintaining justice and order in society, may be taken as the sum of French political idealism. It must be observed, however, that unlike the express provisions of the United States Constitution, there are no constitutional limitations upon the will of the people as expressed through their representatives. The power of the Chambers is as absolute as that of the Bourbon dynasty before 1789.

Character of the French Constitution. Constitutional government in France, while based upon much the same ideal of democracy which prevails in the United States and Great Britain, presents variations in the organization of its agencies of government which offer many instructive points of comparison. We have seen that French democracy has not felt it necessary to place legal restraints upon its own freedom of action. The Revolution did, indeed, issue a Declaration of the Rights of Man and of the Citizen closely paralleling the American Declaration of Independence, but with the overthrow of the royal power it was not felt necessary then or later to include that statement in the Constitution of the State as a guarantee to the citizen body against its own agents of government. Popular control over those agents was regarded as of itself a sufficient guarantee of individual rights. Moreover, the present Constitution, consisting of "organic laws" enacted

in 1875, with subsequent amendments, is the product not of a constitutional convention elected for that purpose, but of an Assembly elected to conclude peace with Germany, which took upon itself the task of a constitutional convention because of the emergency in which the country was placed. The Constitution which this Assembly drafted was never submitted to the people for formal ratification. Amendments to it may be made without other formality than a joint session of the two legislative bodies. The Constitution of France is, therefore, not based upon a formal creative act of the people, but upon the ratification implied in the subsequent acquiescence of the people in the acts of the various National Assemblies which have taken part in its adoption.

Checks and balances in the French Government. But while there are no constitutional safeguards in France in respect to the *powers* of the Government, there are checks and balances which tend to offset radical or ill-considered legislation. These checks and balances consist in the partial separation of the powers of the Government and in the indirect methods of electing the President and the Senate. The President is elected not by popular vote but by the two houses of the legislature sitting in joint session. His executive powers are, however, very limited, since he is by law obliged to appoint as his Council of Ministers men who have the support of the Chamber of Deputies. The result is that the President is actually dominated by his Council, which under the name of the Cabinet is the controlling body of the Government. The composition of the Senate is, however, an actual as well as a legal check upon the Chamber. Its members hold office for nine years, and they are elected indirectly by electoral colleges within each of the departments into which the country is divided. But since the Council of Ministers is dependent solely upon a majority in the Chamber of Deputies, the control of the Senate is limited to its veto upon legislation and does not extend to the administration of the law. In this latter field some measure of restraint upon the government is to be found in the special

administrative courts created to deal with the powers and liabilities of public officials.¹

Instability of French cabinets. Not only is there no constitutional control by a majority of the people over the government they have elected, or by a minority of the people over the small majority which may carry a given election, but no direct relations have been established between the Cabinet and the people as has been the case of recent years in Great Britain. The practice of calling a general election to obtain an expression of the will of the people upon important pending constitutional questions is blocked by the fact that the lower house cannot be dissolved by the President at the demand of the Cabinet, but the Senate also must give its approval. In consequence, a Cabinet which feels that it has the country behind it may not of its own motion appeal to the country over the heads of the members of the Chamber. Moreover, the large number of political parties in France, and the fact that no one of them commands a majority in the Chamber, makes it necessary to constitute coalition ministries roughly representing the various groups. Owing, however, to the lack of any definite principles or policies to which these groups are committed, it is impossible for the Cabinet to feel sure that the majority behind it at any given time can be counted upon to support its measures. Cabinets rise and fall, therefore, in rapid succession, and yet it is difficult for the average citizen to know whether the apparent cause of their fall was the real one, and how far his own principles have gained or lost by the change. The instability of ministries would, indeed, seriously interfere with the conduct of public business, were it not for the fact

¹ F. J. Goodnow, in his "Principles of Constitutional Government," p. 237, is of the opinion that these courts have elaborated a legal system "which is surpassed by none in its success both in protecting individual rights and in promoting government efficiency." Other writers regard them as making the executive independent of the judiciary, so that there is "one law for the citizen and another for the public official." Lowell, "Governments and Parties in Continental Europe," I, p. 58.

that many of the ministers who give up office when the Cabinet resigns are promptly reappointed in the succeeding Cabinet to the same or other posts.

Centralization of the French administrative system. A final point in the French Constitution which offers particularly instructive contrasts with the federal character of the American Government is the centralization of the French administrative system. Of recent years many complaints have been heard that while France is in other respects a democracy her administrative system has remained unchanged since the days of Napoleon, and that it is in organization as well as in fact a bureaucracy. With the exception of the minimum of self-government possessed by the local communes laws are made at Paris for the whole of France, and are executed by the Minister of the Interior through the agency of a prefect appointed by the government in each of the departments. These prefects, over whom the people of the departments have no direct control, have a wide range of authority extending from the supervision of the execution of the national laws to the control of much of the local legislation of the communes. Two distinct issues appear to be involved in the attack upon this centralized system: in the first place it puts into the hands of the government so large an amount of political patronage that it is possible for the party in power (or the combination of parties) to entrench itself so strongly that it cannot be dislodged except by an overwhelming majority. In the second place it entirely eliminates self-government in the local divisions of the state, except in the communes, and even in the communes it reduces self-government to the status of a ward under guardianship. Decentralization is the remedy urged to meet the second of these problems, and the question is once more raised in France whether there can be liberty in a state unless there is local self-government and a strong sense of local as well as of national patriotism.¹

¹ A discussion of the subject may be found in a recent article by J. W. Garner. "Administrative Reform in France," in the "American Political Science Review," February, 1919, p. 17.

The Prussian theory of government. In contrast to the American, British, and French ideal of democracy, the Prussian theory of government leads us into new fields. Here again the ideal must be judged both from the facts of political history and from the teachings of statesmen and of scholars. In the first place the constitutions both of Prussia and of Germany prior to the outbreak of the war represented in their origin not the imperative assertion by the people of a right of self-government, but the more or less voluntary concession by an absolute monarch of a limited measure of democracy. The unsuccessful revolution of 1848 in Berlin doubtless made it seem not inexpedient on the part of William I to promulgate the Prussian Constitution of 1850, but nowhere in Prussian law was the theory recognized of popular self-government as an absolute and indefeasible right. The constitution of the German Empire, adopted in 1871, was, like our own, the constitution of a federal state, but there was no suggestion of popular sovereignty in its provisions similar to the provision "we the people . . . do ordain," contained in the preamble to the Constitution of the United States. "The people" in Prussia were from one point of view a class distinct from the governing authorities.

At the same time the theories of government promulgated in scientific publications and taught in the universities were entirely in accord with the legal position assigned by the constitution to the great body of the people. The state was not a mere group of people who had organized themselves for the furtherance of their common welfare. It had a personality of its own distinct from the collective personality of its citizens; and in consequence it might pursue ends quite apart from the wishes of its citizens as individuals. It was doubtless from the highest motives of patriotism that Fichte enforced, in 1807-1808 at the University of Berlin, the idea of civic duty and self-sacrifice to the interests of the state; but in so doing he subordinated the individual to the state to the extent of making the rights of the individual wholly dependent upon the state.

Hegel, lecturing a decade later at the same university, went still further in his deification of the state, in whose welfare the interest of the citizen found its highest expression. The state did not exist for the welfare of the citizens who composed it, but for the ethical idea embodied in it; so that if the need should arise individuals and their personal interests ought to be sacrificed for the advancement of the state. The doctrines of Hegel became the stock in trade of German university professors and received little or no check in consequence of the small measure of self-government allotted to the people by the constitutions of 1850 and 1871. As developed in the teachings of more recent writers and applied to the domestic and foreign problems of the German Empire they have been a familiar object of attack during recent years. Their interest in connection with the ideal of democracy lies in the fact that it is a simple step to infer from the enthronement of the state as an entity superior to the sum of its members the conclusion that the state is not bound by the moral standards of its individual citizens. "It is a further consequence," says the historian Treitschke, "of the essential sovereignty of the state that it can acknowledge no arbiter above it, and must ultimately submit its legal obligations (towards others) to its own verdict."¹

The German Constitution in 1914. So much has been written since the beginning of the war on the subject of the German Government that it is only necessary here to call attention to certain outstanding features of the German Constitution as it stood in 1914 which explain how it was that a constitution which presented so many of the familiar features of a democratic frame of government could in reality be the instrument of absolutism. This is all the more important because in its outward appearance the German Constitution of 1914 bore a marked likeness to that of the United States in respect to the organization and powers of the government. There is, indeed,

¹ A full and logical discussion of the whole subject may be found in the recent volume by W. W. Willoughby, "Prussian Political Philosophy."

a striking difference between the two documents in that the Constitution of Germany made no provision for the protection of the rights of the individual against the state, which, as we have seen, is a characteristic feature of the Constitution of the United States. The act of the Imperial German legislative body was the supreme law, and there was no appeal which the citizen might take to any higher law protecting his fundamental rights. It is true that the Constitution of Germany enumerated a body of rights belonging to the citizens of the empire which might not be encroached upon by the several states, but these rights afforded no protection against the Federal Government itself nor against the separate state governments in respect to their own citizens. "Constitutionally, then," says Professor Burgess, "the immunities of the individual as against the *powers* of the imperial legislature and executive taken together are nothing; as against the *acts* of the legislature and executive they are what these bodies resolve to allow them to be."¹ Moreover, the Constitution of Germany embodied none of those conventions founded on custom and tradition which constitute a practical if not legal guarantee of individual liberties in Great Britain even against an omnipotent Parliament.

Powers of the Kaiser. The position of the Kaiser as German Emperor by reason of hereditary succession to the throne of Prussia was in sharp contrast to the American plan of an executive elected for a fixed term, but the actual powers attached to the two offices were not greatly dissimilar. In Germany as in the United States the power to negotiate treaties was in the hands of the chief executive, but in the case of the Kaiser the consent of the Bundesrat was not necessary unless the treaty conflicted with some provision of constitutional or statutory law; whereas in the case of the President every treaty must be submitted to the Senate for ratification. Moreover, the President of the United States has no power to declare war, although, as we shall see, he can take steps which may make war practically inevitable; whereas the Kaiser

¹ "Political Science and Constitutional Law." I, 180.

might on his own initiative declare war in cases where the federal territory was attacked, of which he was the sole judge. At the same time the Kaiser could manipulate the forces at work in a diplomatic crisis so as to create, as in 1914, a situation in which the federal territory might be said to be attacked when in reality the reverse was the case. Unlike the President of the United States the Kaiser had no veto power over legislation, but on the other hand he had the power not only to convoke but to adjourn and under restrictions to dissolve the legislature. The power to adjourn was several times used during the war to prevent the Reichstag, the popular representative body of the Empire, from interfering with the conduct of military and diplomatic affairs. The absence of ministerial responsibility made it impossible for the Reichstag to question the conduct of public affairs in an imperative manner.

Influence of Prussia in the Bundesrat. As the Senate of the United States represents the component states of the union, the Bundesrat represented the states constituting the German Empire. The composition of the two bodies differed, however, in that the representation of the German states in the Bundesrat was not on the basis of equality, as in the case of the Senate, and in that the members of the Bundesrat were appointed by the governments of the several states, not elected by the state legislatures, or by direct popular vote as in the case of the United States Senators since 1913. The delegations of the several states voted as a unit, which made it an easy matter for their respective governments to control their votes. Moreover, the powers of the Bundesrat in respect to legislation were considerably greater than those of the American Senate; for bills were first presented to the Bundesrat by the Chancellor as the representative of the Emperor and, if adopted, were then sent to the Reichstag. It is in the composition and powers of the Bundesrat that the chief undemocratic features of the German government were to be found, though these were due to extrinsic rather than to inherent defects. Prussia as the largest German state had 17

votes in the Bundesrat and controlled three other votes absolutely and three more conditionally. It controlled all the chairmanships of the Bundesrat except that of the committee on foreign affairs. Prussia was thus able practically to dominate the legislative activities of the Bundesrat, and in consequence the personnel of the Prussian delegation was of prime importance in judging of the character of the Bundesrat. It was this fact which caused so much criticism to be directed against the undemocratic features of the Government of Prussia as a separate state, which, with its hereditary and appointive upper house and its drastic property restrictions upon the suffrage for the lower house, constituted the guiding hand of the Empire. By a provision of the constitution which made 14 negative votes in the Bundesrat sufficient to veto a proposed constitutional amendment, Prussia was given the power to block any constitutional reforms not acceptable to it.

Democratic character of the Reichstag. On the face of things the Reichstag bore a close resemblance to the House of Representatives of the United States. It represented the German people as a whole and thus cut across, or rather obliterated, the boundary lines between the several states. But for the fact that there had been no redistribution of seats since 1871, and that the industrial and more democratic centers were thus discriminated against, the Reichstag was elected by a thoroughly democratic suffrage. Its powers extended to all subjects within the competence of the Empire, that is to say, to all subjects enumerated in the constitution as being an object of imperial legislation; by the constitution it possessed the right to initiate legislation, but this right had in practice given way to the right of the Bundesrat to prepare measures to be submitted to the Reichstag, so that the latter body in reality did little more than give its consent to measures already passed upon by the Bundesrat. Moreover, the power of the purse, which has been in other countries the chief means by which the popular house of the legislature has enforced its will upon the non-elective branches of the government, was in the case

of the Reichstag seriously restricted by the fact that by custom the army appropriation bills were voted for a period of five years, while other laws, and among them provisions for taxation, once enacted, continued to remain in force until repealed by the same procedure which enacted them, in spite of the fact that the special appropriations desired for them were withheld. Furthermore, German students of constitutional law asserted as a principle that the Reichstag had no right to refuse to pass the budget in order to coerce the executive department into acceding to its wishes. Lastly, it may be noted that by an express provision of the constitution the army was placed directly under the control of the Emperor and was bound by oath to render unconditional obedience to him. While the several states furnished their respective contingents, the army as a whole was organized and drilled under the law of the Empire.

The Constitution of Russia in 1914. Rights of citizens. The constitution of Imperial Russia, like that of Germany, came into being in the form of a grant from the sovereign to the people. Not being framed by a constituent assembly, it represented the minimum of self-government which the czar and his advisers believed it necessary to concede to popular demand, rather than an instrument of government drawn up by the people to give effect to a definite theory of political organization. As late as the revolution of 1905 the Russian citizen enjoyed neither the protection of a habeas corpus act, nor the right of free assembly, nor the right to present individual or collective petitions. Freedom of the press was severely restricted, as was freedom of communication by letter or printed pamphlet. The Fundamental Laws of May 6, 1906, contained an imitation "bill of rights" framed along lines of the traditional guarantees of the British and American constitutions; but the provisions of the law were qualified at almost every turn by the right of the government to make exceptions by general law. While there was a theoretical equality before the law in respect to fundamental rights, there was at the same

time a legal distinction of classes and a discrimination in respect to the value of suffrage in favor of the lesser landed proprietors as against the peasantry and in favor of the larger proprietors as against the lesser.¹ In consequence the abstract protection afforded to the fundamental rights of citizenship was rendered practically valueless in view of the actual inequality of social status and industrial opportunity, and in view of the impossibility of remedying these conditions by the processes of law.

Organization of the government. The organization of the government was so constituted as to deny to the one body representative of the people any control over the administration of the law or the direction of foreign affairs. According to the Fundamental Laws of 1906 the Czar, as Emperor of all the Russias, wielded the "supreme autocratic power." He had "supreme control of all relations of the Russian Empire with foreign powers," and he determined "the course of the international policy of the Russian Empire." The emperor had the right to declare war and to conclude peace and to enter into treaties with foreign countries. He was, moreover, in supreme command of the army and navy, and could order their mobilization and direct their operations. These powers were not nominal, as in the case of a constitutional monarchy like Great Britain, but were powers autocratically exercised and subject to no conventional limitations. Assisting the emperor in the administration of the empire was a Council of Ministers, appointed by him and acting as heads of the principal departments. The legislative body consisted of an upper and a lower house. The former, known as the Imperial Council, was in part appointed by the emperor and in part elected by various groups within the citizen body. Its composition was ultra-conservative in character, and while it did not as a rule initiate legislation its consent, like that of the emperor, was necessary to the adoption of measures. By a process of elimination,

¹Details of the suffrage provisions, which compare with the three-class system in force in Prussia, have been reserved until the discussion of the new revolutionary government. See below, p. 67.

therefore, it can be seen that the lower house, or Duma, while representative of the people within the limits of the restricted suffrage system, was exceedingly limited in its powers. There was no ministerial responsibility to enable it to control the administration of the laws or the foreign policies of the government; and its control over the budget, which in other countries has been the lever of democratic progress, was limited by the rule that certain customary expenditures, amounting to 47 per cent. of the whole budget, were "protected" by the constitution. The army and navy were formally outside the range of its powers. When mobilization was about to be ordered by the government on July 30, 1914, the Duma was as powerless to impose a restraint as was the German Reichstag in the case of the Kaiser. Neither parliament gave its assent to the war until the die had been cast and protests would have been of no avail.

PART II

CHANGES BROUGHT ABOUT BY THE WAR IN THE
POLITICAL INSTITUTIONS OF EUROPEAN COUN-
TRIES. COMPARISONS AND CONTRASTS

CHAPTER III

COUNTRIES WITH AUTOCRATIC GOVERNMENTS

War a contest between whole peoples. It will doubtless be conceded even by those who have greatest faith in democracy as an ideal of government that autocratic governments possess an initial advantage when faced with the problem of a great war. For the conflicts of nations are no longer contests merely between the armed forces of the belligerents in the field. War is now fought between the entire citizen body of one nation and that of the enemy, and the old distinction between combatants and non-combatants has been, except in minor respects, entirely wiped out. The army that fights must now be supported by a far larger civilian force at home, engaged in a wide variety of tasks which are in the truest sense "the sinews of war." The general staff which plans the details of the campaign must take counsel with the board of business advisers who know how to reach the sources of supply for army and navy and can best direct their distribution; the laborer in factory and shipyard is brother in arms to the soldier in the field; the farmer must contribute the extra bushel of wheat without which the food supplies of the country would be inadequate; women must take the places in war industries left vacant by the call of the men to arms; and the public at large, old and young, must alter their ways of life in so far as is necessary to economize this or that vital element in the nation's fighting strength. A war of deadlocked battle lines becomes necessarily a war of exhaustion, and makes it imperative that the resources of the nation be drawn upon to the point of their utmost contribution.

Organization essential to success. Now where the energies of an entire nation are brought to bear upon a single object, organization becomes an essential factor of success. Coordina-

tion and subordination of the diverse economic forces is as important as the existence of the forces themselves. Government now takes on a new character. Hitherto it has been occupied primarily with the task of maintaining law and order in the community, leaving for the most part to the free play of individual activity the satisfaction of the economic needs of the people. It now finds that it must assume control of practically the entire life of the community. Production must be regulated to meet the demands of war; industries engaged in the manufacture of unessential articles must either be discontinued or turned to the production of essential articles; raw materials must be withheld from one factory and given to another on the basis of their contribution to the needs of the war. Distribution must no longer be a matter of satisfying individual wants but of meeting national demands. Prices are no longer to be regulated by the shifting law of supply and demand, but by an arbitrary standard of cost of production. There are thus cast upon the Government a wide variety of tasks to which its organization in time of peace is more or less inadequate. New administrative departments must be created and new authority conferred upon their officials. At the same time complete unity of command becomes as essential to the nation as to its fighting army, and the protection of individual rights ceases for the time to be the object of government in favor of the protection of the community as a whole against external aggression.

Initial advantage possessed by autocracy. It is clear that a government organized along lines which concentrate authority in the hands of a single ruler or of a small number of men, and which remove that authority from the immediate control of a popular assembly, can accomplish the task of transforming a nation engaged in the activities of peace into a nation devoting the last ounce of its strength to war far more easily than can a democratic government. Thus far in the world's history it has not been found possible to organize great armies upon any other basis than that of the most rigid autocratic authority; so

that the call of a nation to arms is a call upon it to submit itself in a greater or less degree to the military discipline of an armed camp. The discussions of parliaments and the checks and balances of a democratic government do but delay and impede the working of the great national machine, which cannot successfully function unless its individual parts are obedient to a single guiding hand.¹ It is not merely a question of the organization of an autocratic government being better prepared to assume the task of directing all the forces of the nation to a common object. There is also the important consideration that the citizens of the state have become accustomed to the voice of command and submit the more readily to the demands made upon them. While popular governments are justifying to their constituents the encroachments made upon their liberties, the autocratic government is receiving the prompt obedience of a disciplined people. Both Germany and Russia profited from this unquestioning response of their citizen body; but Germany's advantage lay both in the fact that her people rendered a more intelligent and better-trained service, and in the fact that the supreme control of the state also extended over a highly organized industrial system.

The menace of autocracy. We have seen above that the absence of ministerial responsibility in Germany left the Kaiser in complete control of the diplomatic relations of the Empire

¹ Sir Henry Maine has expressed in telling form the inconsistency of great armies and popular government. "No two organizations," he says, "can be more opposed to one another than an army scientifically disciplined and equipped, and a nation democratically governed. The great military virtue is obedience; the great military sin is slackness in obeying. It is forbidden to decline to carry out orders, even with the clearest conviction of their inexpediency. But the chief democratic right is the right to censure superiors; public opinion, which means censure as well as praise, is the motive force of democratic societies. The maxims of the two systems flatly contradict one another, and the man who would loyally obey both finds his moral constitution cut into two halves." "Popular Government," p. 22; quoted by Politicus, "Many-Headed Democracies and War," "Fortnightly Review," May, 1918.

with other nations. Negotiations might be entered into in secret and plans adopted, such as those agreed upon at the conference at Potsdam in July, 1914, without the popular house of the legislature being informed of their existence. War threatens in consequence of the Austrian ultimatum to Serbia, and still the Reichstag is officially unaware of the danger of the situation. Mobilization is ordered and war actually declared and begun before the Reichstag is summoned in session. On August 4 the representatives of the people are told that Germany is being attacked and are asked to vote the necessary credits. Considering all the factors of the situation it is now too late to back out, and even those who would not have voted to begin the war are practically coerced to support it. Such are the conditions which throw light upon the meaning of President Wilson's phrase that "the world must be made safe for democracy." "Self-governing nations," as the President says elsewhere in the same address, "do not fill their neighbor states with spies or set the course of intrigue to bring about some critical posture of affairs which will give them an opportunity to strike and make conquest. Such designs can be successfully worked out only under cover and where no one has the right to ask questions." Autocratic nations must, therefore, be deprived of their power to prepare in secret and strike with suddenness the blow which democratic nations are by their very nature at a disadvantage in parrying.

German state socialism an advantage in time of war. A further initial advantage possessed by Germany when confronted by the demands of a great war is to be found in the extent to which state socialism had been adopted in the years preceding the war. Unlike orthodox socialism, which advocates government ownership of the instruments of production and distribution in a state controlled by the workers, "state socialism," as the term is now generally used, consists in a combination of government ownership of certain industries and government regulation of others, while the government itself continues to be controlled by the forces of capitalism. It

therefore fulfills but one of the conditions called for by orthodox socialism, and is so far short of the ideal as to be frankly rejected by many Socialists as worse than the system of private ownership. It cannot be denied, however, that the control by the German Government of the raw materials of industry, of transportation, and of credit, contributed to bring about a condition of economic freedom, in the sense that there was greater equality of opportunity for the smaller producers than would have been possible had great trust companies similar to those of Great Britain and the United States been allowed to control the market. At the same time the German Government adopted a series of measures looking towards a more equitable distribution of the profits of industry; laws were passed providing for sickness, accident, and unemployment insurance, old age and maternity pensions, and labor exchanges, with the result that a relatively high standard of living prevailed among the working classes of the German states.¹ It is interesting in this connection to note that the reaction of the German press to the "nine principles of labor conditions" contained in the treaty of peace with Germany, which set forth the standard of industrial welfare which the nations represented at the Conference desired to attain, was to the effect that Germany had already reached the stage which the League proposed as its goal.

Effect of paternalistic government. That good measures, whether relating to the regulation of business or to the improvement of the conditions of the working classes, may be put into operation by a government from other motives than the abstract welfare of the people is no argument against the measures themselves; but it is important to note that the effect of those measures in Germany was to lessen the desire of the people for political freedom and to create in the masses a sense of confidence in their government which its true character did not justify. Bismarck saw clearly that the progress of

¹ The subject is comprehensively treated in a volume by F. C. Howe, "Socialized Germany."

social democracy could not be checked unless the legitimate causes of social democracy were removed, and he proceeded to urge the enactment of laws which made Germany the foremost paternalistic state of the world. The business men of the community readily acquiesced, because German industry did not make great strides until after the formation of the empire, and they had never been accustomed to the freedom of a *laissez faire* policy. The masses acquiesced because they found in the system a tolerable measure of good-living to which all theories of self-government will ever be a secondary consideration. The result of this subordination of political freedom to economic prosperity was, however, that the German Government, without consulting public opinion or giving the representatives of the people an opportunity to state their views in advance of the irrevocable declaration of war, could count upon the support of a docile and well-disciplined citizen body unaccustomed on the one hand to question its decisions and accustomed on the other to accept the interference of the Government in its private affairs.

Control of industrial life. At the same time the Government had at its disposal much of the clerical machinery necessary to the task of assuming control of all the forces of the national life. The control of the railway system was already in the hands of the Government, which had not only built strategic lines for military purposes, but had by the elimination of competition and the introduction of a unified administration prepared the way for the immediate adaptation of the system to the uses of war. In like manner the mineral resources of the empire were in large part under the control of the Government. Prussia was in its own name one of the largest producers of coal, so that it was not difficult for the German Government to direct the distribution of that important commodity among the various war industries. The production of iron ore, lead, zinc, copper and other raw materials of war industries was likewise largely under governmental regulation. It is true that even the most democratic state might undertake

to bring all these important materials under its direct control; our interest here is merely in observing that where an autocratic government, which has in its hands the power to make war on its own initiative, possesses such control, it has a distinct advantage in the rapidity and ease with which it can adjust itself to the conditions of war.

Advantages of an irresponsible government. During the early years of the war the German Government maintained in many respects this initial advantage. An irresponsible government, not subject to be called to an accounting by the Reichstag, was left free not only to carry out its military policies without obstruction, for these have in all countries been regarded as belonging to a sphere above civilian interference, but also to pursue those policies in which diplomacy as well as military considerations must play a part. While popular assemblies in Great Britain and France were questioning their leaders as to the policies they were pursuing and thus distracting their attention from the important business before them without contributing constructive suggestions, the German Government followed without interruption the plans it had decided upon in secret council. In the meantime the confidence of the people in their government remained practically unshaken. It may well be possible to draw a distinction, as President Wilson did in his address to Congress calling for a declaration of war, between the German people and their government in respect to the moral responsibility for the war, in that "it was not with their previous knowledge or approval" that their government acted in entering upon the war; but while exonerated as an accessory before the fact, the German people, with few exceptions, whole-heartedly supported the Government once the war had broken out, and were easily persuaded by it to become an accessory after the fact.

Counter-balancing disadvantages. But this freedom of the German Government from control by the representatives of the people had its weaknesses as well as its advantages, and a good case may be made out to prove that it was the rock upon

which not only the Government but the empire itself was finally wrecked. In an article entitled "Military Strategy and Diplomacy,"¹ Professor Munroe Smith has pointed out that the control of the Government by the military groups, which was possible in consequence of the absence of ministerial responsibility, robbed the state of the advantage of assuming the defensive in entering the war. The diplomatist naturally seeks to put his country in the apparent position of being attacked, for he knows that the fighting spirit of the country can be best aroused in this way and that the alliances, or at any rate the friendships of the state, will best endure under such circumstances. The militarist, however, has chiefly in mind the advantages of attack and cannot weigh the moral forces which may be set in motion by his act of aggression and which may in turn take material form in the shape of allies for his enemy. No one doubts now that even from the military point of view Germany blundered in not balancing against the advantages of an attack through Belgium the disadvantages of ranging on the side of her enemy the outraged consciences of millions who might otherwise have looked upon the war with indifference. Belgium became a symbol which raised troops whom acts of conscription alone could not have raised. Would an elected President with traditions of accountability to public opinion, would a Cabinet responsible to an elected assembly have blundered in like manner? It is possible, but not probable, in view of the actual evidences of the moral restraint imposed upon democratic governments by the consciousness that their authority is held not by inherent right but as a public trust.

Diplomatic blunders similar to the invasion of Belgium were repeated by the German Government during the progress of the war, and it is not difficult to believe that the faith of the German people in their government was somewhat shaken by them. The drastic punishment of resistance in Belgium, the sinking of the *Lusitania* and other passenger ships, the execution of Edith Cavell and of Captain Fryatt, the deportations of women

¹ "Political Science Quarterly," March, 1915.

from Lille, and the bombardment of London and Paris from the air were, indeed, acts which the army staff of the most democratic country might have ordered, but which are less to be looked for in a country where military policies are subject to the criticism of a popular assembly in closer touch with common human feeling. With the renewal of the submarine warfare and the entrance of the United States into the war the full fruits of the military control of diplomacy began to be reaped. New chancellors succeeded to the old, not from a recognition of the legal right of the Reichstag to demand the resignation of those who had blundered and to appoint others amenable to its wishes, but as an expedient adopted by the Government to strengthen the confidence of the people. That confidence was retained in sufficient strength until the tide of victory turned against the German armies. Autocracy then failed utterly to meet the supreme test, and, after fruitless concessions at the last moment, collapsed completely, carrying the entire constitutional framework with it. It must be left to historians of the future to estimate how far the German revolution was due to forces from within the empire or to pressure from without; but it cannot be denied that the autocratic military organization of Germany fought its war in a masterly fashion, and so long as it met with temporary success it was able to keep popular support behind it; had it succeeded in the end it would have justified itself in the eyes of the people and delayed indefinitely the democratic revolt. Fortunately the odds were against it in numbers and in resources, and with defeat came the disillusionment of the people — a disillusionment all the greater because of the supreme confidence they had placed in their rulers.

The new German Government. The permanence of the new German Government brought about as a result of the revolution of November, 1918, is still a doubtful question, but it has now laid new and firm foundations upon which to build, and for the time being it gives promise of stability. It represents a new order in Germany, far more unlike the old than

has yet been impressed upon the public in foreign countries. One of the last acts of the Kaiser's administration was a decree of October 28, creating ministerial responsibility on the part of the executive to the Reichstag. In the words of the decree "a new order comes into force which transfers the fundamental rights of the Kaiser's person to the people." But the crisis was too serious for half-way measures to satisfy. With the resignation of the Kaiser a provisional government was set up consisting of the leaders of the radical parties in the Reichstag, which promptly decided upon the election of a constituent national assembly endowed with authority to draw up a new constitution. The elections took place on January 19, 1919, and resulted in a victory for a Republic as the new form of government. Universal suffrage without restriction of sex was adopted and the system of proportional representation introduced. The latter reform, which at the same time did away with the unequal distribution of seats prevailing in former elections, was carried out after the usual continental scheme of voting by lists. Germany was divided into 38 constituencies, each returning from 6 to 16 members. The lists were made up by the several political parties and contained the names of as many candidates as there were seats, the names being arranged in order of priority by the party. Votes were cast not for individual candidates but for the lists of candidates, and in proportion to the strength of the party vote one or more of the names on the party lists were declared elected, beginning with the more important names at the top. This method insured the election of at least the leaders in each of the more important parties. The elections resulted in a victory for the Moderate ("Majority") Socialists and a new party of advanced Liberals calling themselves the Democrats. The more conservative Catholic Center came next, with the radical Independent Socialists and the National Party and German People's Party, the two latter consisting of adherents of the old National Liberal and Conservative Junker parties, bringing up the rear.

The problem of federalism. The debates in the Convention at Weimar, which undertook the establishment of a new constitution for Germany, revive for the student of government the critical years from 1787-1789 when the fate of the American federal republic was in the balance. At the same time they throw valuable light upon some of the present problems of Federal Government. Immediately upon the abdication of the Emperor separatist tendencies among the German states began to manifest themselves. Should Germany continue to be a federal state, and, if so, should Prussia, its largest member, continue to dominate the federation? The draft constitution prepared by Dr. Preuss, German Secretary of the Interior, proposed that Prussia should be divided up into a number of autonomous states representing roughly the states absorbed by the original Prussia in 1815 and 1866. A unified Prussia, consisting of more than half the population of the entire Republic, would obviously create an unstable balance of power. But if Prussia were to be divided up to help to equalize the membership of the federation, the other German states which had been granted special privileges by the Constitution of 1871 would be called upon to yield them up to the central government. Some few German publicists advocated the establishment of a unitary Germany which would abolish state lines completely, but the proposal did not meet with any general acceptance.

The decision finally reached by the Assembly was in favor of maintaining the unity and federal character of the former empire. A National (Federal) Council was created, supplanting the former Bundesrat, in which the states were given representation in proportion to their population. Prussia was permitted to remain intact, but provisions were adopted which sought to break up a solid Prussian vote by placing half of the Prussian votes at the disposal of the Prussian provincial administrations. In the division of powers between the central government and the separate states a far wider range of jurisdiction is assigned to the empire¹ than is assigned to the

¹ The term *Reich* is still used, and no inconsistency was seen in mak-

Federal Government in the United States. Indeed, so complete is the possible control which the empire may exercise over the life of the country that Professor Preuss maintains that the empire is in reality a unitary state preserving the forms of a federal government. Curiously enough, one feature of federalism abandoned in the United States in 1789 still remains in the new German constitution, namely, that "the laws of the empire shall be executed by the state authorities unless otherwise provided by national law."

Organization of the Government. The National (or Federal) Assembly, which replaces the former Reichstag, differs from that body in a number of important particulars. The system of election by proportional representation is provided for, as well as universal suffrage for men and women over 20 years of age. The power of the Assembly over legislation becomes paramount, subject only to a veto by the National Council, which can be overcome by a two-thirds majority of the Assembly. A striking innovation is introduced in the form of a national referendum on federal legislation, which can be taken either upon the decision of the President, or upon petition of one-twentieth of the qualified voters when one-third of the Assembly demands that the promulgation of the law be deferred. Measures may be initiated by the people upon petition of one-tenth of the qualified voters, but in such cases the Assembly shall first pass upon the bill, and if it act favorably the popular vote will not take place. Similar provisions for the use of the initiative and referendum in respect to constitutional amendments are introduced.

The President of the Republic. The President is elected by the people for a term of seven years, and provision is made for his removal by popular vote upon demand of a two-thirds vote of the National Assembly. A negative vote of the people upon the question of removal has the effect of dissolving the first article of the constitution announce that "the German empire is a republic." The word "commonwealth" has been suggested as a more descriptive translation.

the National Assembly. The powers of the President resemble those of the President of the United States, with the difference that the acts of the President of the German Republic require for their validity the counter-signature of the Chancellor or of the other Minister within whose province the act falls. In consequence the President is relieved of responsibility and the extensive powers conferred upon him are rendered more or less nominal. Both the Chancellor and the Ministers require for the administration of their offices the confidence of the Assembly, and each of them must resign if the Assembly by a formal resolution withdraws its confidence. A system of cabinet government is thus created in which ministerial responsibility is individual rather than collective as in the case of Great Britain and France.

The protection of fundamental rights. Industrial councils. In respect to the second function of a constitution, the determination of the relations of the citizen body to the Government, a "bill of rights" is drawn up which contains the usual guarantees of equality before the law, of freedom of speech and of the press, of immunity from searches and seizures, of freedom of Assembly and other personal rights. Exception may, however, be made by national law, so that it is not clear what will be the actual measure of individual liberty to be enjoyed by the German citizen. Besides these provisions the Constitution contains a number of details regulating the "community life," including marriage, the protection of motherhood and of children, and self-government in cities. Separation of church and state is provided for, and general principles are laid down with regard to education. A unique section dealing with "economic life" lays down the principles of freedom of contract, the right of private property, the expropriation of landed property, where necessary, with compensation, the "socialization" of certain private enterprises by transfer to public ownership, and, when urgently necessary for the common good, the combination of business enterprises into autonomous bodies in which employers and employees shall have

a share in the management and the administration of the whole shall be conducted for the common good. In addition an important step is taken in the recognition of the right of co-operative control of industry by both employers and employees. Wage earners and salaried employees are to be represented in local workers' councils, organized in each establishment, as well as in district workers' councils in each economic area, and in a National Workers' Council. By adding to their membership representatives of the employers and of the interested public these workers' councils become "economic [industrial] councils," representing all substantial vocational groups. The National Economic Council at the top of the system is made in a degree a legislative body by the requirement that drafts of fundamental laws relating to social and economic policy shall be submitted to it by the Cabinet before introduction into the National Assembly. At the same time the Economic Council has the right itself to propose such measures for enactment into law.¹

General character of the new Constitution. It is clear that the new German Constitution is a document of fundamental importance, and could it be considered apart from the record of Germany during the years of the war it would be welcomed with acclaim by the other democratic nations of the world. Taken at its face value it not only represents an attempt to establish a truly democratic form of government, but it contains many elements of intrinsic worth. In organization it seems to combine both the promise of efficiency, through its provisions for cooperation and finality of decision between the several departments of the Government, as well as the promise of effective popular control through its provisions for the modified use of the initiative and the referendum. In the social and economic program, set forth at great length, it proposes to

¹ A scholarly translation of "The Constitution of the German Commonwealth," by W. B. Munro and A. N. Holcombe, has been published by the World Peace Foundation. The word "commonwealth" is used by the translators as the present equivalent of *Reich*.

reconcile the conflicting demands of individualism and of socialism, and while assuring the protection of the economic liberty of the individual and the right of private property it seeks to regulate both in the interest of the common needs of the public at large. Its provisions for the establishment of industrial democracy closely approximate to the program of the British Labor Party and the recommendations of the Whitley Report.¹ Can it be regarded as a final break with the old order, and the repudiation not only of its representatives but of its political principles? Observers from without may hesitate to recognize the value of so sudden a conversion. But it must be remembered that the opponents in Germany of the old order were far more numerous than their representation in the Reichstag, by reason of the unequal distribution of seats, would indicate. Will the new constitution receive the support of a substantial majority of the people and become a permanent basis of government? The outlook is not without hope. During the debates of the Constitutional Convention the great body of the people appeared to be but little interested in the task undertaken. The effects of generations of political servitude cannot be overcome in the course of a single year. A political consciousness must be created by the actual practice of self-government. But there is good promise for the future in the instinctive recognition by the people of the necessity of law and order and in the sense of duty to the State so carefully inculcated by their former rulers.

The Government of Austria-Hungary. The federal character of the Austro-Hungarian empire differed in essential respects from that of Germany. It consisted of a loose union between two large states, Austria and Hungary, both of which were unitary in form although containing within their borders numerous nationalities of alien race and language. The joint government of the Dual Monarchy was limited to foreign affairs, war, and finance, and was conducted by means of a legislature, consisting of delegations from the two states, and an

¹ See below, p. 98.

administration consisting of the emperor-king and ministers directing the three departments of the Government. In theory ministerial responsibility existed in the joint government of the dual state and in the separate governments of Austria and Hungary; but in practice the legislative assemblies were able to exercise very little restraint upon the administration. This was chiefly due to the fact that there existed a multiplicity of political parties and factions, representing not only the divergent economic and political interests of the people but also the numerous races of the two states with their separate nationalistic claims. The result was that the empire, instead of being obliged to select ministers who had the confidence of the representative assemblies, was able to select men who could succeed best in playing off one party against another and thus remain themselves in large measure free from control. The revolution of 1918 took, therefore, from the start a separatist turn. Czechoslovakia, consisting of the Austrian provinces of Bohemia and Moravia and the Hungarian province of Slovakia, declared its independence,¹ as did also Croatia, Slavonia, and Dalmatia, which, together with the dependent provinces of Bosnia and Herzegovina, joined with Serbia and Montenegro to form a new Jugo-Slav state. Hungary then set up a separate republic, leaving Austria proper isolated.

Dangers attending the break-up of Austria-Hungary. The polyglot empire thus met the inevitable doom predicted for it long before 1914; but it is of no little interest to the student of government to note that evil as well as good has attended its fall. Four new and distinct states with their rivalries and jealousies now take the place of the old confederation, and already there are signs that they cannot live together in any degree of friendliness. Until the last year of the war it was the conviction of many well-informed observers that the true solution

¹ It is an interesting point of international law to note that the independence of this state was recognized by the United States before it had been able to do more than declare its desire to be a state through a national committee speaking for it in a foreign land.

of the problem of the Austro-Hungarian nationalities was not the complete independence of the distinct communities, but rather autonomy in matters of local government together with constitutional rights as members of a federal empire. It was thought that autonomy in local matters would suffice to meet the fair claims of national groups to the free pursuit of their own ideals of culture in matters of religion, literature, art, festivities, and other forms of self-expression; while on the other hand the subordination of those groups as members of a federal empire would tend to remove the barriers of suspicion and discord which inevitably arise between rival neighboring communities, and would facilitate the friendly intercourse of the states within the federation. Such a federation would, it was pointed out, make impossible the creation of competitive tariffs and would put the railways and the ports of the several states at the common disposal of all. Mr. H. N. Brailsford expressed the economic aspect of the situation by saying that "it is easy to denounce Austria-Hungary as a 'ramshackle Empire' and to call for its dismemberment, but the more one contemplates the strange fact of the union of these many races in one political unit, the more one is driven to the conclusion that there is a solid and natural reason for their combination. The reason is geographical and economic."¹

The protection of minorities. One further feature of the proposed federation of the races of Austria-Hungary is of special interest to students of American Government. The great problem of all federal states where there is any large and coherent minority with separate interests of its own is to secure the protection of the fundamental rights of the minority without unduly restricting the activities of the local governments. In the United States, for example, the 14th and 15th amendments to the Constitution protect the negro in his rights of life, liberty, property and suffrage against the encroachment of the state governments, leaving him in respect to less important rights subject to the local law. The case of the various

¹ "A League of Nations," p. 100.

nationalities of Austria-Hungary presents a striking illustration of the need of such guarantees, owing to the fact that scarcely anywhere can the boundary lines of nationality be drawn so as not to include within the national group a minority of another race. It was proposed, therefore, that not only should the several constitutions of the autonomous groups contain a guarantee against the oppression of racial and religious minorities, but that the Federal Constitution should likewise embody those guarantees. If this were done, "Vienna would see," as Mr. Brailsford says, "that the Czechs did not oppress the Germans in Bohemia, and Budapest would be vigilant for the Magyars in Transylvania."¹

Conditions imposed by the Peace Conference. The Peace Conference at Paris was fully aware of the difficulties attending the recognition of the independence of the former component parts of Austria-Hungary; and being in a position to dictate terms to the new states it imposed conditions upon their admission into the family of nations. Austria itself, shorn of much of its territory, acknowledges under the treaty that the obligations looking to the protection of minorities are matters of international concern over which the League of Nations has jurisdiction. She assures equality before the law and complete protection of life and liberty to all inhabitants of Austria without distinction of birth, nationality, language, race, or religion, together with the right to the free exercise of any creed and to the free use of any language in public or private, with reasonable facilities to those of non-German speech for the use of their own language before the courts. Equal opportunities in schools and other educational establishments are promised, and in districts where citizens of non-German speech exist in considerable number facilities must be given for the instruction of the children in their own language, and a due share of the public funds is to be provided for the purpose. The treaty with Hungary imposes like conditions, and the same result is sought in the case of Czechoslovakia

¹ *Ibid.*, p. 107.

and Yugoslavia by the requirement that the new states agree to conclude treaties with the principal allied and associated powers for the protection of racial and religious minorities.

Difficulties of the situation. How far-reaching some of these demands of the Conference are, and how difficult is the problem with which Austria, for example, is faced, assuming the most sincere attempt to carry out her obligations, can be gathered by a comparison with the policy followed by the United States in dealing with similar questions. Conditions are, of course, essentially different in the United States, since the country developed a distinct English-speaking national character long before the present foreign-language elements came into its midst; whereas in Austria and Hungary the diverse races and languages have been so long settled upon the soil that they have acquired prescriptive rights which are too deep-seated to be readily abandoned. Our big cities have their Italian quarters and their Polish, Jewish and Hungarian quarters, but the American people would hear with amazement a proposal not only that Italian or Polish should be the language of the court-rooms and the medium of instruction in the public schools in those quarters, but that the administration of those matters should be subject to the supervision, not of New York or of Washington, but of the League of Nations sitting as an international executive council.

The fall of autocracy in Russia. The breakdown of the Russian autocratic régime during the war was due partly to political and partly to economic problems. The Government of Russia enjoyed, as we have seen, the initial advantage of being able to reach its decisions without the delays incident to parliamentary control and of being able at the same time to count upon the prompt obedience of the people. But while sharing this advantage with Germany, the administrative organization of the Russian Government was immeasurably inferior to that of its opponent, and at the same time the spirit of national unity which characterized Germany was much weaker in Russia and the response of the people was less dis-

ciplined and intelligent. Treason in the Government began to manifest itself early in the war, due largely to the control which Germany had obtained over the business life of the country; but it was not successful in impeding the operations of the army until the summer of 1916. In the meantime the need of military supplies, which had been felt from the very beginning, and the inadequacy of the transportation service to distribute food to the centers of population provided the occasion for the revolution which the economic and political system of the country had long invited. In the face of the defeat of its armies and the starvation of its chief city Russian autocracy was unable to maintain its hold. The lesson of the war with Japan in 1904-1905 should have been a warning that autocracy cannot hope to survive a war of exhaustion unless it has succeeded in winning such a degree of loyalty on the part of its subjects as to lead them to submit to the yoke without compulsion. Where the German Government had denied political freedom to its people, it had at least granted them an economic freedom which won their allegiance. The Government of the czar attempted to carry the double burden of fighting a formidable enemy from without and at the same time maintaining an enforced obedience from within.

Political importance of the Russian revolution. So complete has been the transformation of Russian political institutions as a result of the revolution of 1917 that it will be many years before it will be possible to present a final estimate of the situation. But the lessons of the Russian revolution even in its present stages are of tremendous significance not only for the future of government in Russia but for the future of government in all the countries of Europe and, indeed, of America and Asia as well. Like those of the great French Revolution, its doctrines have swept like a flood-tide over the surrounding countries, and though the waters may recede, as did the waters of the French revolution under the absolute government of Napoleon, it is safe to predict that for years to

come seeds of new political thought will be found to have taken root in what would, but for that flood, have been arid soil. The French Revolution gave a new meaning to political liberty; it proclaimed that men had certain rights which the State had not given him and which the State could not take away. Those rights were the fundamental rights which belonged to human nature as such, and in respect to those rights all men were equal. Other rights might exist under sanction of the law, such as the ownership of great estates, but being contrary to those fundamental rights they could have no real value. Now it is not difficult to point out the fallacies involved in much of the French revolutionary doctrine, and the excesses committed in the attempt to give practical application to that doctrine will ever be one of the world's tales of horror; but at the same time no student of history will fail to recognize the basis of truth underlying the radical theories, and to appreciate the extent to which democratic ideals of a succeeding generation were built up upon that basis.¹

The heritage of the new government. The Russian revolution introduces a similar situation of political revolt founded upon acute economic distress; but owing to the progress of industrial concentration during the nineteenth century, and to the development of radical plans of economic reform in the shape of Socialism and of Syndicalism, the Government which has emerged from the revolution is organized upon an industrial as well as upon a territorial basis. In analyzing the character of the new Soviet Republic it is important to distinguish between the organization of the Government as a legislative and administrative agency and the political principles which it proposes to put into effect. The organization of the Government is radically different from the familiar systems of other continental countries, but it is not necessarily undemocratic, and could conceivably be applied in other countries which utterly

¹ An excellent discussion of the subject may be found in C. D. Burns, "Political Ideals," Chap. VII.

repudiate the principles by which those who control it are animated. It can best be understood by a reference to the institutions of local self-government in Russia before the war. The local *mir*s and the *volosts*, the larger *zemstvos* in the provinces, and the municipal *dumas* still appear, like stones from a demolished edifice, in the walls of the new political structure.

Local government before the revolution. Beginning with the smallest unit of self-government, the village, we find the village *mir* composed of the peasant householders of the village, not including the land-owners as such, if they were of the nobility. The peasants thus formed a class apart, and as they constituted more than three-fourths of the population they were within the restricted sphere of their local interests almost a law unto themselves. The *volost*, or *canton*, or *township*, was the next highest unit of government, and it consisted of a number of *mir*s with an assembly composed of delegates elected by the *mir*s. It is here that we note the presence of that characteristic feature of Russian Government which is carried to the nth degree in the organization of the *soviets*, namely, the indirect election of officials. The *volost* was an old unit of government given new administrative and judicial duties under the reform decrees of the sixties. Through its assembly it brought the semi-independent *mir*s within the control of the central government; but as in the case of the *mir* its powers were very limited, and it was more an agent of the central government than an organ of local self-government. Being composed solely of the peasantry it emphasized once more the organization of the people by distinct classes.

The next larger units of government were the district and the province, each with its representative assembly known as the *zemstvo*. The provincial assemblies consisted of delegates from the district assemblies and derived all their powers from the latter bodies. Suffrage for the district *zemstvo* was sharply restricted both by property qualifications and by the

indirect election of the delegates of the peasantry through their volosts. The powers of the zemstvos were in theory limited to local economic interests, but it proved difficult to draw the line between their jurisdiction and that of the central government. At the same time the activities of the zemstvos were constantly subjected to interference from the provincial governors, whose consent had to be obtained before the decisions of the zemstvos could be carried into effect. Similar to the zemstvos in the rural districts were the municipal dumas, which were elected by a three class ("curia") system based upon property qualifications and bearing a resemblance to the electoral system for the lower house of the Prussian Landtag.¹

The electoral system of the Duma. In the case of the Duma of the empire, as in that of the provincial zemstvos, democracy was defeated by a method of indirect elections which removed the voter in some instances as many as four degrees from his candidate. Under a new law of 1907 representatives to the Duma were elected by a series of electoral colleges in each of the provinces, which were in their turn elected by electoral assemblies representing the three classes of landed proprietors, townspeople, and peasants. The larger landed proprietors sat in these assemblies in their own person and were thus but two degrees removed from their candidate; the lesser proprietors combined to send delegates to the assemblies, and were thus three degrees removed from their candidate; while the peasantry elected delegates to the assemblies through the intermediary of their indirectly elected volosts, and were thus four degrees removed from their candidate. The urban population elected delegates directly to the colleges, but by a class system of voting which gave the advantage to large property holdings. Industrial workers were, like the peasantry, specially represented by delegates to the colleges elected on the basis of one for every 50 employees.

¹ Details of the development of local political institutions in Russia before the revolution may be obtained from a brief volume by Professor Paul Vinogradoff, "Self-Government in Russia."

It is obvious that the system, without actually depriving the citizen of a vote, rendered that vote as ineffective as possible against the influence of the Government in the election.¹

Organization of the new Soviet government. A knowledge of the representative system employed for the various representative bodies in Russia before 1917 is necessary to an understanding of the peculiar character of the new Soviet government. By comparison with the American electoral system, where the individual citizen votes directly for city, county, state, and federal officials, the Soviet Constitution continues the indirect methods formerly in operation in Russia, but places them upon a squarely democratic, or rather proletarian and peasant basis. The organization of the Soviet government may be best understood by picturing it in the shape of a huge pyramid at the base of which is the entire citizen body of the Republic. Beginning, as in the description of Russian self-government before 1917, with the smallest units of government, we find in the cities "soviets" or "councils" composed of deputies of the industrial workers who, as we have seen above, had been kept as a class apart under the old electoral system. After the revolution soldiers, who in most cases were peasants, were admitted to the organization, and we hear of the Petrograd Council (Soviet) of Workmen's and Peasants' Deputies. Corresponding to this organization in the cities is the village soviet, based upon the old village mir, which, like the organization of workmen in the cities, was composed of peasants as a class apart, and which, with the complete collapse of all central authority, immediately began to assume new powers. It is upon this double foundation of urban and rural soviets that the elaborate superstructure of Soviet government has been built up.

Successive congresses of local soviets. The Constitution of the Russian Socialist Federated Soviet Republic, adopted

¹ A more elaborate explanation may be found in an essay entitled "The Representative System in Russia," by Professor Paul Milioukoff, in "Russian Realities and Problems."

July 10, 1918, describes (Article III) the organization of the Government beginning with the central body and descending to the local bodies, but it is at once clearer and more logical if we follow the reverse order. The composition of the individual soviet is, in the cities, on the basis of one deputy for each 1000 inhabitants, the total to be not less than 50 and not more than 1000 members.¹ In the towns, villages, and hamlets of less than 10,000 inhabitants there is to be one deputy for each 100 inhabitants, the total to be not less than 3 and not more than 50 deputies for each settlement; but it is expressly provided that in small rural settlements all questions shall be settled at general meetings of voters, as in the village mirs. The village soviets send representatives, on the basis of one delegate for 10 members of the soviet, to the rural congresses of soviets, which correspond to the former volost assemblies. In turn these rural congresses of soviets send representatives to a county congress of soviets, which corresponds to the old district zemstvo. Again in their turn the county congresses send representatives to the provincial congress, to which the urban soviets also send representatives. It is interesting to note that in the provincial congress, which is the first body in which delegates from both urban and rural constituencies meet, representation is accorded to the cities on the basis of one for each 2000 *voters*, and to the rural districts on the basis of one for each 10,000 inhabitants. Once more, the provincial congresses send representatives to the regional congress, which is limited to 500 members for the entire region, and in which there is a further distinction between city voters and rural inhabitants.²

¹ It is to be noted that the elections in the cities are conducted by factories and occupational groups (lawyers, doctors, teachers, etc.) and not by residential precincts and wards. In the country districts the divisions remain territorial as before, but the population, being agricultural, needs no separate trade organization.

² The reader who is baffled by the complexity of the Russian governmental structure may recall and make comparisons with the following subdivisions of the United States: federal court circuits embracing a

The central government of Russia. The next step leads us to the All-Russian Congress of Soviets which is the "supreme power" of the Republic. This national legislative body is composed of representatives of the urban soviets on the basis of one delegate for each 25,000 voters, and of representatives of the provincial congresses on the basis of one delegate for each 125,000 inhabitants. But though it is the supreme power of Russia, the All-Russian Congress of Soviets is not itself the actual governing power, but rather the controlling power of the Government. For the Congress in its turn elects the All-Russian Central Executive Committee of not more than 200 members, which is responsible to the Congress and is "the supreme legislative, executive, and controlling organ" of the Republic. It directs the activities of the local soviet bodies and coordinates and regulates the operation of the Constitution and the resolutions of the Congress. In turn the Central Executive Committee creates a special cabinet known as the Council of People's Commissaries, which is entrusted with the general management of the affairs of the Republic, and which, subject to the control of the Executive Committee, may issue decrees and orders necessary for the proper conduct of government affairs. The Commissaries stand at the head of the 17 commissariats or departments of government corresponding to the departments of administration in other countries. Each commissary has an advisory "college" or committee, the members of which are appointed by the Council and of which he is the president.

Indirect versus direct control of representatives. Considered as a purely political contrivance the organization of the Soviet Republic is one of the most remarkable schemes of government ever adopted, and as an experiment in a peculiar form of indirect democracy it would be watched with the number of states, the states themselves, electoral districts for members of the House of Representatives embracing a number of counties, electoral districts for state senators, counties, townships, and cities.

greatest interest by statesman and student alike were it not that the conditions under which it is being tried out make it impossible to judge of its merits or demerits. To an American who is accustomed to vote directly for city, county, state and federal officials, and who believes that by this means he can exercise direct control over them and call them personally to account for their actions, it will come as a surprise to observe what purports to be popular government so organized as to make bureaucratic control almost inevitable. Putting aside the suggestion that it was actually introduced for that purpose, we may consider an argument offered by its supporters to the effect that "it makes the highest official responsible to the individual peasant in the remotest corner of the country." Theoretically this is true, but the responsibility is made effective through seven or eight stages of indirect control superimposed upon indirect control. The system might work quite successfully if citizens and their delegates and their delegates' delegates were all cogs in the wheels of an elaborate mechanism, so that pressure applied at one end of the system would inevitably be felt, in however small a degree, at the other end. But elected officials are after all human beings, and even assuming the highest honesty on their part no observer of the practical workings of democracy in countries where it has been tried out can have any great faith in a system of popular government which removes the electorate by so many degrees from the ultimate governing officials.¹ Even if the Russian people were a unit on fundamental principles and divided by no greater differences of opinion in matters of daily legislation than mark the two great political parties which control the United States, it is scarcely conceivable that the system of government provided by the Soviet Constitution could be kept free from the control of a bureaucracy. The experiment,

¹ Before 1913 United States Senators were elected by the legislatures of the several States, and the evils which attended even that limited form of indirect election are sufficiently familiar to all students of politics.

were the circumstances attending it not so tragic, would be one to which the attention of public men in every country would be earnestly drawn.

Distinction between the Soviet organization and Bolshevik principles. It is important to distinguish sharply between the framework of government provided by the Soviet Constitution and the political principles by which those who framed the constitution were animated. The Bolsheviks, who were the radical wing of the Social Democratic party,¹ controlled the drafting of the Constitution and their theories are written into it in the Declaration of Rights, which forms Article I of the Constitution, and in the provisions for the suffrage contained in Article IV. The Declaration of Rights calls for the "socialization" of land by the abolition of all private property in land and the apportionment of the land as national property among husbandmen in the measure of the ability of each to till it, without any compensation to the former owners. In like manner forests, treasures of the earth, water power, model farms and agricultural enterprises, and banks are declared to be national property. Factories, mills, mines, railways and other means of production and transportation are turned over to the control of the workmen subject to the regulations of a Supreme Soviet of National Economy. Article II frankly states that during "the present transition period" the Constitution involves the "establishment of a dictatorship of the urban and rural proletariat and the poorest peasantry . . . for the purpose of abolishing the exploitation of men by men and of introducing Socialism; in which there will be neither a division into classes nor a state of autocracy." At the same time Article I provides that "during the progress of the decisive battle between the proletariat and its exploiters, the ex-

¹ Considerable divergence has arisen in the interpretation of the name "Bolsheviks." As explained by Lenine, the term refers to a "majority" faction in the Social Democratic Congress in 1903. This faction later became extremely radical, and although no longer a majority it continued to retain the name.

exploiters can not hold a position in any branch of the Soviet Government"; while Article IV excludes from the suffrage "persons who employ hired labor in order to obtain from it an increase in profits," persons who possess an income derived from invested capital, private merchants, trade and commercial brokers, the clergy, and other obnoxious persons.

Federal character of the future Soviet Republic. A final point of no little interest in the Constitution of the Soviet Republic is the provision made for the subsequent creation of a federated state. We have already seen that the organization of the Soviet Government introduces a new division into Russia known as the "region." The Constitution provides that the All-Russian Congress and the Central Executive Committee shall establish boundaries for the regional soviet unions, which are to be made autonomous in cases where they "differentiate themselves by a special form of existence [? way of life, customs] and national character." Permission is granted by the Constitution to the soviets in the different parts of the Republic to decide whether or not they desire to participate in the Federal Government. It is apparently contemplated that distinct peoples, such as the Lithuanians, the Letts, the Finns, the Ukrainians, the Georgians, and others, a number of whom had already set up independent governments at the time the Constitution was adopted, shall ultimately become distinct autonomous members of a Federated Republic,—“a league,” as the Constitution expresses it, “free and voluntary, and for that reason all the more secure.” The Constitution does not, however, work out the dividing line between the powers of the central government and those of the member states.

CHAPTER IV

COUNTRIES WITH DEMOCRATIC GOVERNMENTS

WE may now turn from the consideration of the changes brought about in the political institutions of those countries whose governments were to a greater or less degree autocratic, and study the effect of the war upon the political institutions of two of the great democratic states of Europe, Great Britain, and France. In the case of the autocratic countries the war completely transformed their governmental systems. Not only was autocracy driven from its place of power, but with it went even those elements of popular government which had been the subservient tool of autocracy. In the case of Germany local self-governing institutions survived; in the case of Russia, Austria, and Hungary, they too were swept away by the high tide of revolution. By contrast, the great democratic countries came through the ordeal with their former governmental systems structurally intact. France and Italy suffered the least in respect to changes in their governments, owing to the fewer traditions embodied in their constitutions. Great Britain, with older traditions of free government, found it necessary to introduce far-reaching changes which must mark for all time a turning point in its political history. The Defense of the Realm Act, though pointing not forward towards democracy but backward towards autocracy, must hereafter take its place for the student of history with the great documents like Magna Charta and the Bill of Rights, which are landmarks of the British Constitution.

Democracy at a disadvantage in time of war. Case of Great Britain. We have seen that autocracy possessed an initial advantage in the beginning of the war by reason of the ready adaptability of its political system to the complex organ-

ization of a national fighting machine. If modern war is fought not between armies but between peoples, if it requires the transformation of the entire economic and social life of a nation, so that processes of production and distribution, hitherto left to the operation of "natural" laws, must be minutely regulated and individuals are no longer to be free in the choice of their pursuits, it is clear that democracy can be no match for autocracy unless it temporarily adopts autocratic methods. Popular control must give way to a unity of command which can issue orders without the delay of discussion in Parliament, and which can pursue its plans without being called to account until the final result has been accomplished. This conversion of a democracy into an autocracy was naturally all the more difficult in a country such as Great Britain where the tradition of individual liberty was strong and where the Government possessed practically no agencies for the new work which it was called upon to do. The complete unpreparedness of the British Government for the colossal task that was imposed upon it was only matched by a corresponding failure on the part of the public to realize the extent to which its own traditional rights would have to give way before the exigencies of a national crisis. Democracy awoke but slowly to the realization that it could only save itself by abandoning for the time the very principles of freedom in defense of which the battle had been begun.

British cabinet government and war policies. The primary political problem before the British Government during the course of the war was to secure the fullest measure of unity of control and of unhampered authority, while at the same time it had to maintain the confidence of Parliament and of the people. It may be observed in passing that government by Parliament through the agency of a responsible ministry had a decided advantage in this respect over the system of divided authority prevailing in the United States. We shall later see in detail the numerous obstacles placed in the way of an efficient war administration by the constitutional checks and

balances established between the legislative, executive, and judicial branches of the American Government. Cabinet government, combining in the same hands the powers of the executive and legislative departments, made the assumption of practically absolute power an easy step. The control of Parliament, exercised normally by means of questions and interpellations, could be kept in reserve and brought into exercise only when there was a general feeling that the Government was becoming deficient in its task. So long as the Cabinet could retain the confidence of Parliament it was able to run the country with as free a hand as if it possessed absolute power under the Constitution. There were no constitutional limitations to restrict its authority and no courts to question the validity of its decrees. At the same time its authority extended into every corner of the kingdom, and there were no reserved powers possessed by the local divisions of the country which might limit the jurisdiction of the central government. For all practical purposes the voice of the Cabinet was the voice of democracy, while its hands were the hands of absolutism.

The Liberal Cabinet. The outbreak of the war found a Liberal Cabinet in office supported by a majority in Parliament consisting of the Liberal party, which of itself did not constitute a majority of the whole, and of the Irish Nationalist and Labor parties. Without altering its Liberal composition, the Cabinet entered into a truce with the opposition Unionists, which resulted in the suspension of the customary practice of parliamentary interpellation and criticism, and enabled the Cabinet to put through Parliament a large number of emergency acts without the delays attendant upon discussion and debate. At the same time the Cabinet obtained the passage of a resolution by which the normal "parliamentary initiative," under which individual members presented their bills, was dispensed with in favor of the passage of legislation desired by the Cabinet. But though given a free hand, the Cabinet which had proved equal to the tasks of peace proved unequal to those

of war. Dissatisfaction began to be expressed in and out of Parliament, and the Unionist leaders insisted that they could no longer refrain from criticism unless their party was represented in the Cabinet. The Prime Minister acquiesced, and a new Coalition Cabinet was created on June 3, 1915.

The Coalition Cabinet. The new Cabinet represented the abandonment of the traditional system of party government which had grown up in Great Britain after the revolution of 1688, and which had become by custom a part of the British Constitution. Its twenty-two members included the chief political leaders of the different political parties; so that the opposition benches were henceforth silent, except for the voices of isolated groups of radicals. At the same time the law, or rather the convention, of the Constitution that newly-appointed ministers must resign their seats and stand for re-election was set aside, in order to avoid the inconvenience of holding elections at so critical a time. But the Coalition Cabinet, while it proved to be more efficient than its predecessor, failed to give satisfaction, and demands were heard for the creation of a smaller governing body which, freed from the responsibility of directing the departments, could give its entire time to the conduct of the war. The result was that in November, 1915, there was formed within the Cabinet a smaller body of six members, known as the "War Committee," which, with the assistance of a military, naval, and diplomatic staff, was given general direction of war measures, subject to a limited control on the part of the Cabinet as a whole. Thus organized, the Coalition Cabinet maintained the confidence of Parliament for more than a year, and succeeded in weathering the critical period which accompanied the introduction of conscription. But again criticism, especially from the influential press, called for a reorganization of the administration, and in the presence of a proposal from the Minister of Munitions, Mr. Lloyd George, that a Council of War be formed from which the Prime Minister was to be excluded, Mr. Asquith and the en-

ture Cabinet resigned, and on Dec. 10, 1916, a new "War Cabinet" under the leadership of Mr. Lloyd George took its place.¹

The War Cabinet. The War Cabinet was a constitutional innovation even more striking than the Coalition Cabinet. In the first place it was not the result of a parliamentary vote, but of an agreement between the leaders of the parties, entered into at the dictation of the Minister of Munitions in the rôle of the man most essential to the Government. Further, the War Cabinet not only abandoned the relationship of responsibility to the larger body of cabinet officers, which had been assumed by the War Committee, and became directly responsible to Parliament, but it at the same time cut itself loose entirely from the active direction of the administration and exercised merely a supervisory control over the numerous ministerial departments. Though nominally responsible to Parliament, the War Cabinet did not undertake the task of party leadership in the House. Its members attended the sessions of Parliament only on special occasions, and left Parliament to discuss as it pleased matters over which it had no control. It nevertheless remained in sufficiently close touch with Parliament to be able to allay distrust should it arise. The ministers in charge of the administrative departments continued to represent a coalition of the parties, but their relations to the Cabinet became somewhat uncertain. No provision was made for their meeting in common or for the coordination of their functions; and as they had been increased to the number of eighty-eight there were frequent conflicts of authority among them which the War Cabinet was called upon to adjust. A further difficulty lay in the subordination of the more important heads of departments, now reduced from their former cabinet rank, the Secretaries of War and of Foreign Affairs, and the First Lord of the Admiralty, to the smaller cabinet group who were rather

¹ For further details see a monograph entitled, "British War Administration," by Professor John A. Fairlie, published by the Carnegie Endowment for International Peace.

directors of policy than skilled administrators. In the meantime the old Liberal leaders, completely overlooked in the choice of the War Cabinet and of the more important ministerial posts, revived the Opposition in the House of Commons, and the paradoxical situation was at times brought about in which Mr. Asquith from the Opposition bench came to the rescue of the Government which had ousted him and forestalled what might have been votes of lack of confidence.

Attitude of public opinion towards the War Cabinet. Public opinion, as represented in the leading organs of the press, on the whole acclaimed the new Cabinet and acquiesced in the departure from constitutional traditions in the hope that the war might be more effectively prosecuted as a result of the change. The Conservative press naturally looked with favor upon a Cabinet in which its party was represented by three members out of five at a time when it possessed but a minority in the House of Commons. The Northcliff press saw in the new Cabinet the promise of that unity of action which it had long urged as essential to the winning of the war. On the other hand several of the leading Liberal papers condemned both the surrender of Mr. Lloyd George to the Conservative party and the inherent weaknesses of his "new kind of government." "How long," commented "The Nation," "Parliament will tolerate so irregular and futile a separation of dignity from responsibility, and from the elaborate and detailed functions of modern government, remains to be seen."¹ "The Executive Ministers," it repeated the following week, "are not Mr. George's co-equal colleagues, but subordinates who may be summoned to discussions, as the chief clerks in a large firm may be summoned to consult, one by one, with the partners. It is stupefying that the vital decisions, which will end the war or prolong it indefinitely, will be taken by these four or five men alone, and that in their decisions the three Ministers who are nominally responsible to Parliament for foreign policy, the Army, and the Navy, will have only a consultative voice."

¹ Issue of December 16, 1916.

By contrast an able British publicist, after stating that "it cannot be disguised that democracy has been a failure in war since the beginning of history," asserted that Great Britain needed the one-man executive provided for by the American Constitution. "A small inner Cabinet, divorced from administration, is a great improvement compared with an Executive of twenty-three tired men who have to look after administrative, legislative, and party-political matters as well, and who in addition have to waste their time in Parliament . . . Unless Mr. Lloyd George is able to dominate his colleagues as Chatham did in his time, unless Great Britain possesses virtually a one-man Executive, he should seek for power which will make the Prime Minister solely responsible by law. . . . It is better that war should destroy the traditional disorganization of democracy than that the traditional disorganization of democratic government should destroy democracy itself and the British race."¹

Extension of the legal duration of Parliament. Turning from the Cabinet to Parliament itself, of which the Cabinet is but a select committee, it is instructive to note, in comparison with the American system of constitutionally determined tenure of office, how easy it was under the British system for Parliament to extend its official life by a simple legislative act. By the Parliament Act of 1911 the former maximum term of seven years was reduced to five, and considering the circumstances attending the passage of the act it may be said to have become at once a part of the British Constitution. But the very first operation of the new rule in respect to parliamentary elections came at a time when elections could not be held without seriously distracting the Government from the conduct of the war. Had Great Britain possessed a constitution as rigid as that of the United States she would have been obliged to hold her elections, as we did in 1918, in spite of any inconvenience. But possessing an elastic constitution, parts of which are no more than parliamentary statutes to which a special authority

¹ Politicus, "Many-Headed Democracies and the War," "Fortnightly Review," May, 1918.

is attached by reason of their intrinsic importance,¹ Great Britain was able to meet the emergency without hesitation or discussion. Successive laws were passed by Parliament extending its own legal existence, and the elections which should have been held in 1916 were actually not held until 1918, when the war had been won and the attention of the party leaders could be given to domestic politics.

Parliament during the war. We have seen that the creation of a Coalition Cabinet suspended for a time the organized Opposition which is a characteristic feature of Parliament. With the creation of the War Cabinet the Opposition was revived in the persons of the Liberal leaders who had been overlooked in the choice of the new government. Their hands were, however, tied by the fact that in every instance they were obliged to measure the value of their criticism against the danger of disorganizing the Government at a time when it was more important to give even an inefficient government a free hand than to risk the delays incident to change. Parliament continued to discuss war policies, but with the separation of the Cabinet from active administrative duties, and with the appointment of a large number of ministers who did not have seats in Parliament, there was frequently no responsible minister present to reply to the inquiries of Parliament into the measures taken by the Government. As Mr. Bonar Law expressed it, the new ministers were going to their offices "to do work," and not to "defend" what they did in the House of Commons; upon which "The Nation" commented to the effect that the whole mechanism of government was now divorced from the representative system. "The fiction," it said, "that the majority of the House has a tendency and a policy is abandoned. The minister is now either an outsider, or else a Member who is not expected to attend its sittings. He works exclusively in his Department, surrounded by bureaucrats, and he is in effect an untrained bureaucrat himself. What survives of the powers of the House is merely a

¹ See above, p. 27.

recognition of its right to hear a 'defense' of what is done. The defense, however, no longer involves any personal contact of the Minister with the House."¹ In a number of instances even the members of the ministry who had seats in Parliament were absent from the sittings, and under-secretaries were the only persons from whom Parliament could obtain a "vicarious" defense of what was being done. Mr. Bonar Law acted as a sort of "sentry, set on guard to protect the inner Cabal from Parliamentary snipers," and without necessarily attending the sittings of the War Cabinet and having only a nominal responsibility for what it did, he was delegated to undertake the defense of its decisions in the House. "It is clear," said "The Nation," "that the Northcliff-George revolution means nothing less than the suspension of Parliamentary government itself."

The elections of 1918. The elections to Parliament held in December, 1918, are of particular interest as illustrating the political dangers incident to the elastic character of the British Constitution in respect to the duration of Parliament. If the United States had been passing through as serious a crisis in 1918 as Great Britain was passing through in 1916, it is possible that we might have envied the British their ability to postpone elections without the formality attending an amendment to the United States Constitution; but at the same time the fixed date for elections in the United States made it impossible for the party in power to time the elections so as to secure the greatest political advantage. As soon as the armistice had been signed the Coalition leaders made preparations for a general election, to be held on December 14th, on the ground not only that Parliament had outlived its legal life, but that in view of the coming peace conference it was necessary for the British spokesmen to know that they had behind them a House of Commons which was the latest expression of the popular will. The old-line Liberal and Labor parties both objected on the ground that there was no necessity for an election, since

¹ Issue of December 23, 1916.

the people would support the War Cabinet in the making of peace with the same confidence with which they supported it during the war. Moreover, many of the three million soldiers on foreign soil either would be unable to vote or would vote in the dark. There was, it was said, no clear issue, but rather a call upon the people to support the Government which had "won the war," and which could be trusted to "make Germany pay" and to carry into effect measures of reconstruction in the form of better housing and better social conditions. It was freely charged that the Prime Minister was seeking to secure himself in power for a longer term by calling for a vote of personal confidence at a time when the public mind was more intent upon securing the fruits of victory than upon weighing carefully the policies which the Government would pursue in the days of peace to come. A striking feature of the elections was the small percentage of registered voters who appeared at the polls.

Call for reform. The elections were marked by a triumph for the Coalition government, but a triumph secured under conditions which directed serious attention to the electoral reform known as proportional representation. For the first time in British political history a formal government list of candidates was put forth and the full pressure of the Coalition leaders brought to bear against their opponents. Candidates stood for the Coalition without abandoning their party affiliations. Loyalty to the Coalition constituted a government "coupon" of credentials, and Tories who supported the Coalition were "couponed" into the seats of the Anti-Coalition or "Asquith" Liberals; while in other instances Coalition Liberals were elected by Tory voters. The result of the crossing of the issue of loyalty to the Government with the old party policies, and of the three- and four-cornered contests due to the presence of the old-line Liberal and the Labor candidates, was that the Coalition obtained 87 per cent. of the candidates with only 56 per cent. of the votes. The Unionists obtained some 380 members from about five million votes, while

two million and a quarter Labor votes obtained less than 60 members, and Liberalism with a million and a quarter votes obtained but 26 members.

In consequence of these inequalities between party representation and voting strength there has been a renewed demand for a reform of the electoral system. The "Speakers' Conference," in presenting the report which was made the basis of the new Franchise Act of 1918,¹ recommended that the old single member constituencies should be merged into larger constituencies which should return a number of members in accordance with a plan of proportional representation. The House of Commons rejected the proposal. The House of Lords, however, strongly favored it, and, while failing to secure its incorporation into the bill, succeeded in having a clause adopted providing for the appointment of commissioners to prepare a plan of proportional representation for the election of 100 members in certain town and county areas combined into constituencies returning from three to seven members. At the same time proportional representation was adopted in respect to university constituencies returning two or more members. The support of the proposal by the conservative membership of the House of Lords and its defeat by the Conservatives in the House of Commons shows a division of opinion either as to the effects of the measure in protecting minorities, or as to the possibility of the Conservative party being in the minority in the near future. The program of the Manchester Liberal Federation, published on May 26, 1919, calls for a House of Commons to be elected by proportional representation for a term not exceeding five years and not to be dissolved before the expiration of that period except after a special resolution passed by the House itself. But on the other hand it is urged by even so progressive a paper as the "New Statesman"² that proportional representation can only be introduced at the sacrifice of the essentially democratic sys-

¹ See below, p. 93.

² April 19, 1919.

tem of by-elections, which, by indicating the changes of public opinion, is of greater value than a more accurate reflection of the state of mind of the electors at a given moment.

Proposals of reconstruction. What is to be the future of parliamentary government in Great Britain? On all sides it is agreed that the dictatorial power of the War Cabinet must be surrendered to Parliament, but there is considerable difference of opinion as to the relations henceforth to be established between the Cabinet and Parliament. A Machinery-of-Government Committee of the Ministry of Reconstruction has presented an important report in which it describes the essential functions of the Cabinet as consisting of the determination of the policies to be presented to Parliament, the supreme control of the national executive in accordance with the policy prescribed by Parliament, and the continuous coordination and delimitation of the activities of the several departments of state. It advocates that the Cabinet should be reduced to a smaller body of ten or twelve members in place of the twenty or more members of 1914. At the same time the number of the ministerial departments is to be reduced according to a scheme which distributes the business of the Government into ten main divisions, with occasional subdivisions, bearing a general resemblance to the ten executive departments in the National Government of the United States. The Committee, moreover, recommends that the reality of parliamentary control be restored over the country's finances, and that parliamentary committees should be constituted to watch over the activities of the departments.

Further suggestions from various sources are of less practical value, such as the proposal that the solidarity of the Cabinet should be broken up by making individual ministers responsible to Parliament and removable by a vote of want of confidence. Comparison is also made with the French committee system, which, in spite of the inconveniences attached to its frequent changes of membership, does in fact make of the Chamber of Deputies a working body which can not only

criticise the work of the administrative departments but contribute valuable constructive advice to the Government. It is a frequent comment of American writers that the unified system of cabinet government in Great Britain possesses singular advantages in point of efficiency over the lack of coordination and the duplication of functions exhibited in the American Federal Government. We shall consider this question in detail later, but it may be observed here that the Federal Congress has never been reduced to the humiliating status now held by the British Parliament. If Parliament is to be restored to its former position of dignity, it must be made more than a critical onlooker in legislation. The mere power to overturn cabinets must ultimately, with the break-up of the two-party system, render the British Constitution dangerously unstable, unless it be accompanied by the sense of responsibility which results from a knowledge of the practical alternatives to the policies criticised.

Substantive war legislation. Turning from the changes in the organization of the British Government brought about by the war to the substantive legislation adopted to meet the successive emergencies with which the country was faced, we may distinguish between legislation of a positive character, having in view the control of all the resources of the country for the more effective prosecution of the war, and legislation of a negative or prohibitory character, encroaching upon constitutional rights hitherto immune from control. In both instances traditional principles of British Government were set aside and new rules introduced to which, but for the emergency which called them forth, the term "revolutionary" could fitly be applied. The legislation of a positive character adopted during the course of the war leads us into economic and social fields of study which are outside the scope of this volume; but at the same time such legislation bears sufficiently upon the problem of government to warrant consideration of it in so far as it called for the creation of new political agencies of control, or altered the fundamental relations previously existing between the state and the industrial life of the citizen body.

Control over industrial life. It was but natural that a country which, like Great Britain, had pursued a traditional policy of *laissez faire* in relation to production and distribution, should be led at the outset to adopt voluntary methods in the readjustment of its industrial system to the demands of war. If the production of the necessities of war could be increased and distribution facilitated by the mere appeal to patriotism, there would be no need to resort to governmental machinery which would have to be specially created for the occasion. Moreover, the full measure of the demands which the war was to make upon the country dawned but slowly upon the Government and the public alike. In consequence it is possible to mark off a series of successive stages in the increasing control of the British Government over production, distribution, and exchange.¹ It is interesting to observe that the dates of these stages correspond approximately to the political stages which have been referred to above. From a Liberal Cabinet working under a party truce, the Government passed to a Coalition Cabinet in June, 1915, and again to a smaller War Cabinet in December, 1916. In like manner the control of the government over industrial life proceeded from tentative measures of control over the essentials of national existence to a complete mobilization of industrial resources which could be brought to bear upon the production of military and naval supplies, and finally to more stringent measures extending to industries indirectly connected with the war and to the production and consumption of food supplies. The experience of Great Britain in these matters proved of great value to the United States when faced with similar problems; and it is only when read in the light of the lessons learnt from Great Britain that the rapidity with which the United States adjusted its industrial life to the demands of the war can be properly understood.

¹ The subject is treated in detail in a volume by Professor H. L. Gray, "War Time Control of Industry: the Experience of England," which has been freely drawn upon in the three following paragraphs.

Government control of the railways. The first important step taken by the Government on the outbreak of the war was the assumption of control over the railway system. On August 5th the Government placed the administration of the railways in the hands of a committee of railway managers with the President of the Board of Trade as chairman. In accordance with a previous agreement the compensation to be made to the owners was to be fixed by arbitration, and as a result of this action the Government undertook to pay to the companies, together with the new receipts, the sum by which the new receipts of the railways while under government control should fall short of the net receipts for the corresponding period of 1913. The railways were thus guaranteed the profits which they had been obtaining in the period immediately preceding the war.

Munitions of war. The next important problem to engage the attention of the Government was the necessity of increasing the production of military and naval supplies. The Defense of the Realm Act had authorized the military authorities to take over the output of any factory or workshop in which arms, ammunition, or warlike stores were manufactured, and a later amendment conferred the additional authority to take over the output of "any factory or workshop, or any plant thereof," and to require the factory to do work in accordance with directions, which might go so far as to restrict the work done in one factory in order to increase the work in another. A Ministry of Munitions was created in June, 1915, and a Munitions of War Act was passed which was a final and decisive step in the control of the state over industry. Net profits were fixed, which might exceed by no more than one-fifth the net profit before the outbreak of the war. By later regulations the prices of iron, steel and copper were fixed, and priority regulations were adopted securing to the various industries their essential supplies in the order of war-time importance. The control of the production of coal proved difficult chiefly because of the problem of meeting the demands of the Miners' Federation,

which not only insisted upon increased wages to meet the increased cost of living, but refused to come under the control exercised by the Government in other industries and threatened industrial revolt when attempt was made to put pressure upon them. In the presence of an impending strike in November, 1916, the Government took possession of the mines in South Wales, and on March 1, 1917, the remaining coal mines of the country were taken directly under the control of the state. A new department was created to administer the mines, and a Controller of Coal Mines was appointed.

The Government and Labor. Intimately bound up with the problem of government control over the railways, munition plants, and coal mines, was the question of the adjustment of the conditions of labor. In the case of the railways, which were directly under government control, a "truce" was concluded with the two large unions, by which a scheme of conciliation worked out in 1911 came into effect, subject to six weeks' notice to terminate. Readjustments of wage schedules took place at intervals, and strikes which had been threatened were postponed accordingly. In August, 1917, the Government was forced to apply the law declaring a strike illegal until resort had been had to the arbitration of the Minister of Labor. In the case of the munition factories which were not under direct government control, the Munitions of War Act of 1915 provided for the compulsory arbitration of disputes and introduced a system which made it a condition of securing new employment that the worker should obtain from his last employer a "leaving certificate."¹ On one occasion a local union called a strike in violation of the provisions of the act, but the strike was repudiated by the central union, and the Government felt strong enough to arrest the leaders of the strike and thus brought it to a prompt end. In the case of the coal mines, as has been said above, the Miners' Federation refused to allow

¹ So bitter, however, was the opposition of the labor unions to these "leaving certificates" that provision was subsequently made for their abolition, which was accomplished on October 15, 1917.

the compulsory arbitration features of the Munitions of War Act to be extended to them, and threats of strikes were frequent until the Government assumed direct control.¹

The Defense of the Realm Act. The war legislation of a negative or prohibitory character is of great political interest because of its encroachment upon the fundamental personal rights of British citizenship. It had for its general object the prevention of interference with the Government in the conduct of the war and the enforced cessation of acts which, whether done with deliberate intent or not, might give aid to the enemy. On November 27, 1914, a Defense of the Realm Consolidation Act was passed, combining and amending two previous acts and conferring upon the King in Council the power to "issue regulations for securing the public safety and the defense of the realm." These regulations might authorize the trial by court martial, or in the case of minor offenses by courts of summary jurisdiction, and the punishment of persons committing offenses against the regulations. Special reference was made to regulations designed to prevent persons from communicating with the enemy or obtaining information for that purpose, to secure the safety of the national forces and ships and means of communication, to prevent the spread of false reports or reports likely to cause disaffection to the Government, and otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered. This act, popularly known as DORA, from the initial letters of its title, was supplemented on the following day by the Regulations authorized, which went into details with regard to the objects sought by the act.

Scope of the Act. The Defense of the Realm Act with its Regulations struck down with a single blow the personal liberties and rights of property which have been held as the most sacred tradition of the British Constitution. In the first place

¹ Further details may be obtained from a recent study of "British Labor Conditions and Legislation during the War," by M. B. Hammond, published by the Carnegie Endowment for International Peace.

it deprived the citizen of his right of personal liberty, in authorizing any person acting under the military and naval authorities to arrest without warrant any person "whose behavior is of such a nature as to give reasonable grounds for suspecting" that he had acted or was about to act in a manner prejudicial to the public safety or the defense of the realm. Moreover, the military authorities could, upon mere suspicion and without proof of any kind, require any private citizen to reside where they pleased and to report himself to them whenever they thought fit. They could stop any citizen as he walked the streets and compel him to answer questions, even though by so doing he might incriminate himself. In the second place freedom of speech and of the press were both brought under the control of the Government by the regulations designed to prevent the spread of reports likely to cause disaffection. Censorship of the press had not existed in Great Britain since 1694 when the licencing act of 1662 was repealed; and the freedom of the press meant of course only the absence of censorship, for there had always been restrictions upon the press imposed by the law of libel, of sedition, and of treason.¹ By the Regulations the military authorities had it in their power to "punish with penal servitude for life any journalist who speculates as to the plan of campaign of the British or French forces, and with six months' imprisonment if he criticises the dietary or accommodation of the new recruits."² So sweeping were the terms of the law that every newspaper editor practically acted at his peril in publishing any information whatever, and no discussion of "supposed plans" by military experts was permissible. In the third place the Act and the Regulations authorized searches and seizures without warrant on the mere ground that the military authorities had "reason to suspect" that any house or other premises were being used "for any purpose or in any way prejudicial to the public safety or the defense of the Realm," or that anything found therein was being used for

¹ See above, p. 26.

² Baty and Morgan, "War: Its Conduct and Legal Results," p. 112.

the said purpose, including newspapers and type or printing plant where there had been a contravention of the regulations relating to the press. No longer was the Englishman's home his castle, no longer was he free to criticise his government with even the best of intentions, no longer was he free to come and go as he pleased.

Military law extended to civilians. The above restrictions were stringent enough even considering the extraordinary emergency that called them forth. But what was perhaps severest of all was the extension of military law to the entire citizen body. The Act of November 27, 1914, in authorizing the Regulations abolished trial by jury in favor of courts-martial and courts of summary jurisdiction and denied the writ of habeas corpus. At the time of the passage of the act the question was raised by Viscount Bryce in the House of Lords "whether the British subject is not entitled, as he always has been in times past, to have the constitutional protection of being tried in a civil court when there is a civil court there to try him." In past times military law had always been limited to the armed forces of the state; it was here extended so as to treat every citizen "as if he were a person subject to the military and had on active service committed" the offense. On March 16, 1915, an amendment to the act was adopted giving the accused the right to demand a jury trial, but no provision was made to secure his release from custody, nor was he given on acquittal any right of action for malicious prosecution or for false imprisonment. These provisions may compare unfavorably with the less drastic action taken by the Congress of the United States when confronted with a similar problem; but it must be remembered that the situation in Great Britain was far more critical in respect to espionage than in our own country.

Problems of reconstruction. It is impossible within the limits of these pages to deal at further length with the steps taken by Great Britain to adapt her political institutions and industrial life to the demands of the war, valuable as are the

comparisons which these steps offer with those taken by the United States under similar conditions. We must now turn to a brief survey of the problems of reconstruction faced by Great Britain and mark out some of the probable lines of development. What new democratic forces have been released by the war? To what extent are they organized for effective action? What is their program of national and local reform? Can this program be fitted into the existing political and industrial organization, or must radical changes take place before it can be introduced?

The extension of suffrage. The political basis for a new era of reconstruction was laid on February 6, 1918, when the Representation of the People Act was adopted, removing the last restrictions of sex and property from British suffrage. A man now votes because he is a citizen, not because he possesses a certain amount of property, however limited that amount may be. This principle would in itself have logically demanded the enfranchisement of women, had not the services they were rendering in the various fields of war work also made it impossible for Parliament to deny them an equality of political rights. The restriction that women must be over thirty years of age is an anomaly explained by the fact that the women largely outnumber the men, but it is so inconsistent as a logical proposition that its repeal, together with the limited property qualification imposed upon women, cannot but be a matter of time. While thus extending the suffrage the act at the same time removes a number of political inequalities which existed under the old system. Plural voting is, however, in part an exception, and it is still possible for a man to vote in a constituency where he occupies premises for business purposes as well as in the constituency where he resides, and to vote in the double capacity of university graduate and citizen. A redistribution of seats was provided for, with a resulting gain to the cities whose population had increased out of all proportion to that of the counties. With the limitation of plural voting to two constituencies the old practice of polling on different

days in different localities was abolished in favor of holding all elections on a single day.

The new Labor Party. The second striking feature of the political heritage of the war is the appearance of a stronger and better organized Labor party. We cannot discuss here the possible effect which this third party, now become formidable, may have upon the cabinet system of government, which has been generally regarded as a stable and effective form of government only when Parliament was composed of two more or less evenly balanced political parties. The principles of the Labor party are, however, of great importance in view of its increasing strength. Prior to the war the Labor members in Parliament, having won 42 seats in the general elections of 1910, formed a separate and independent group, but "they were not a party, in the accepted sense of the word, and some of them had not shaken off their allegiance to the historic parties."¹ The Labor organization was a federation of local and national societies rather than a "national popular party." The new Labor party, however, makes its appeal to a wider circle of voters not connected with trade union organizations but in sympathy with the ideals of the party. In the elections of 1918, as a result of the prominence given to the issues bearing upon the terms of peace, the Labor party, while gaining sixty seats, lost from Parliament three of its most important leaders, including Mr. Henderson, its chief organizer. Its parliamentary representation, moreover, was composed, with but one exception, of trade unionist officials, the realization of the ideal of a national popular party appealing to brain workers and hand workers alike being thus postponed. On the basis of proportional representation the party's success would have been considerably greater, since it polled over two and a quarter million votes.

Its reconstruction program. The program of the Labor party is best set forth in a Draft Report on Reconstruction

¹ Arthur Henderson, "The Aims of Labor," p. 17, where a sketch of the growth of the Labor Party may be found.

prepared by a sub-committee of the party executive and submitted to the annual conference of the party for further discussion.¹ The report describes in detail the "four pillars of the house" which Labor proposes to erect. The first of these is the establishment of a "national minimum," that is, a general standard of living for all the workers, which shall insure to them "all the requisites of a healthy life and worthy citizenship." As part of this policy the program imposes upon the Government the obligation to find suitable employment in productive work for all men and women, and advocates the adoption of a system of social insurance against unemployment. The second "pillar" is a more radical proposal in the form of a demand for the democratic control of industry. The Labor party not only calls for "effective personal freedom" as a first condition of democracy, as well as complete political rights in the form of an even more liberal suffrage law and the abolition of the privileged House of Lords, but calls for "democracy in industry" as well. It demands, therefore, the progressive elimination of the "private capitalist" and the introduction of a "scientific reorganization of the nation's industry . . . on the basis of the common ownership of the means of production." The proceeds of industry are to be shared "among all who participate in any capacity and only among these." In the case of railways, mines, and electrical power plants, the program calls for immediate nationalization; and the existing control of the Government over the importation of wheat and other commodities and the centralization of the purchase of raw materials is to be continued.

The third and fourth "pillars" consist in new schemes of taxation and in plans for the use of the surplus wealth of the country for the common good. The system of taxation must not encroach upon the prescribed national minimum standard of life, nor must it involve a protective tariff, nor a taxation of the necessities of life, nor indirect taxes interfering with production or commerce. Rather it must include the

¹ "The Aims of Labor," Appendix II.

direct taxation of incomes above the necessary cost of family maintenance, a levy on capital to pay off the national debt, taxes on the unearned increment of land, and death duties (inheritance taxes) based upon a maximum amount which a person should be able to leave by way of provision for his family. At the same time the surplus wealth of the nation, obtained from the nationalization of mines and of the instruments of production and from the taxation of excess profits, is to be distributed in the form of pensions and of better educational facilities for all. As can readily be seen, the Labor party thus takes common ground with the Socialists on many points, and without using the name or adopting the orthodox "class warfare" principles of Socialism, it looks for the support of the moderate wing of the Socialist group. Considering the strength of the party and the possibility that within the coming decade it may obtain a majority in Parliament and come to control the Government, Americans cannot but view with interest its success in winning popular support outside of the ranks of organized labor.¹

Program of the Ministry of Reconstruction. Early in the war the British Government realized that steps should be taken to provide for the period of reconstruction after the war. The Coalition Cabinet entrusted the study of reconstruction problems to a small Secretariat attached to a committee of the Cabinet. Sub-committees of the Cabinet committee were formed to deal with the following questions: agricultural policy, demobilization of the army, acquisition of powers, coal

¹ It must be noted, however, that the program of the Labor party has not received the support of a large number of influential persons in the labor movement. Many such, indeed, dissent vigorously from the "policy of the Fabian Society and of Mr. Sidney Webb" which it embodies, and consider that the program, though "eminently practical in its proposals," is nevertheless "vitiating by the fact that it turns for help always to the State, and ignores or underestimates the vital forces of economic organization which exist and act, in the main, independently of the State." G. H. D. Cole, in the "Dial," November 30, 1918.

conservation, aliens, forestry, relations between employers and employed, and women's employment. As the war became more and more prolonged and the disturbance of the normal conditions of industrial and social life became greater and greater, making it clear that reconstruction must mean something much more constructive than a mere return to pre-war conditions, the War Cabinet created in March, 1917, a new committee under the chairmanship of the Prime Minister, composed of members of Parliament, of representatives of labor, of men of business, and of experienced social workers. New sub-committees were appointed to deal with the following questions: adult education, civil war-workers demobilization, acquisition of land, machinery of government, local government, and a ministry of health; while the problems of housing, unemployment, physical training, juvenile employment and apprenticeship, the supply of raw materials, and shipping, were likewise considered by the committees.

A further step, however, was yet to be taken by the Government, and in July, 1917, a Ministry of Reconstruction was created. The reason for this step was that the existing reconstruction committee had no responsible connection with Parliament except through the Prime Minister whose attention could not be given to its work, and at the same time had no effective contact with the ministers responsible for the great departments of the administration. The functions of the new minister were "to consider and advise upon the problems which may arise out of the present war and may have to be dealt with upon its termination, and for the purposes aforesaid to institute and conduct such enquiries, prepare such schemes, and make such recommendations as he thinks fit." The minister was given certain concurrent powers with the other departments of the Government which were conducting inquiries in their own fields, and was called upon to assist these departments with such information as might be useful to them. The new department divided itself into branches dealing with commerce and production, with finance, shipping, and common services,

with labor and industrial reorganization, with rural development, with the machinery of government, central and local, with health and education, and with housing and internal transport. An advisory council was appointed by the minister, representative of the leading interests concerned in reconstruction, and the membership of its several sub-sections was so arranged as to include persons representing in each case the interest more directly concerned in the particular problem. A number of reports from the earlier sub-committees have already been published, such as the Report on the Machinery of Government, referred to above, and the important Whitley Report, dealing with joint standing industrial councils as a means of securing a permanent improvement in the relations between employers and workmen.¹

Value to the United States of political experiments in Great Britain. It has been felt necessary to discuss in some detail the changes brought about in British political institutions as a result of the new conditions created by the war, because these changes must have a far-reaching effect upon the future government of Great Britain, and must in turn inevitably influence the course of development of democratic institutions in other countries. We have entered upon an age in which new ideas of political liberty are passed from nation to nation as formerly from county to county of the same state. To Americans, Great Britain is as it were a political laboratory in which experiments of the highest importance are being carried out, upon the success of which the introduction of similar methods in the United States will partly depend. As Russia is conducting hazardous, but none the less valuable, tests of the fundamental conceptions of democracy, of the value and

¹ Further details of the organization and functions of the Government's committees on reconstruction may be found in "The Problems of Reconstruction," edited by L. Rogers, International Conciliation Bulletin No. 135. For a bibliography of the subject, see the "Select List of References on Economic Reconstruction," compiled by the Library of Congress, which includes the reports of the British Ministry of Reconstruction.

limitations of the rights of property, of legal equality in contradistinction to natural inequality, so Great Britain is for us a field in which some of the newer problems of democracy are being worked out along lines which seek to preserve the old traditions of political liberty, while extending the scope of liberty to include economic and social elements without which political liberty is an empty formula. Is industrial democracy a feasible solution for the conflict between labor and capital? Can a better distribution of national wealth be obtained without destroying the mainspring of individual initiative and removing the incentive to the development of ability? Is representative government to hold its own against the increasing demand for direct government of the people? Can majority rule be permitted to control the Constitution as well as the statutory law of lesser importance? These are but a few of the questions which both countries are facing, but which it seems probable that Great Britain will have to answer first. Good government is not a matter of abstract, *a priori* reasoning, but of experimental tests; and we cannot but look with interest upon the solution which is given to these questions in a country whose political traditions are so closely similar to our own.

Changes in the Constitution of the British Empire. Not only were British domestic political institutions profoundly affected by the war, but the relations of the British Empire to its self-governing dominions underwent a fundamental change which is still in the process of development. When the war broke out Canada, Newfoundland, Australia, New Zealand and South Africa possessed an extent of autonomy which was, for the practical purposes of their domestic administration, equivalent to complete independence. Executive authority was exercised nominally by a Governor-General appointed by the British Crown, but actually by a privy council or cabinet subject to the control of their respective parliaments. Legislation was completely within their control in all matters except the relations of the dominions with other countries, and

even in respect to treaties it was becoming the custom of the British Government to consult the wishes of the dominions before concluding commercial treaties relating to them. But over the foreign policy of the British Empire the dominions had no control; the mother country spoke for them in the councils of Europe and decided the issues of war and peace. Automatically the declaration of war by Great Britain against Germany made the dominions parties to the conflict.

The response of the dominions to the call of the mother country was immediate, and by August, 1918, over a million men had been contributed to the cause. At the same time the political leaders of the dominions made it clear that the dominions would never again suffer themselves to become involved in a war by the autocratic action of a Government in which they had no formal representation. Nor had the dominions in the first years of the war any voice in the military policies of the British Government. After the formation of the War Cabinet in December, 1916, an invitation was sent out to the Governments of the dominions and of India to be present at a special war conference to consider political and commercial matters of joint concern. The Conference sat side by side with the Imperial War Cabinet, at which the representatives of the dominions met the Prime Minister and his colleagues of the War Cabinet for the discussion in secret of the most important aspects of imperial policy. At the close of the Conference a resolution was adopted, on April 16, 1917, postponing until the close of the war "the readjustment of the constitutional relations of the component parts of the empire," but placing it on record, as the view of the Conference, that any such readjustment "while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same."

Federalism versus autonomy. The resolution of the Imperial Conference was generally interpreted as negating the

plan of a federal empire with an imperial parliament and an imperial executive. "The idea on which this resolution is based," said General Smuts in speaking on the resolution, "is rather that the empire will develop on the lines upon which it has developed hitherto: that there will be more freedom and equality in all its constituent parts; that they will continue to legislate for themselves and continue to govern themselves; that whatever executive action has to be taken, even in common concerns, would have to be determined, as the last paragraph says, 'by the several governments' of the empire." And again, on another occasion, "we are a system of nations. We are not a state, but a community of states and nations." On the other hand there is a group of federalists who urge that the only stable union that can be established between the dominions and the mother country is one growing out of a central government to which the members of the federation would bear the clear and definite relations which can be laid down in a formal written Constitution. It cannot be hoped, they argue, that the informal conferences and consultations, such as those of 1917, will be adequate to bind together the distant parts of the empire once the old centrifugal forces are released by the termination of the war. An imperial cabinet for the decision of questions of foreign policy and imperial defense would be inevitably driven to consider economic and political issues affecting foreign policy, and the demand for an imperial parliament would be the logical result. One federalist has sketched an elaborate plan in which provision is made for an imperial legislature consisting of a senate representing the states of the union and a house of representatives composed of representatives of the peoples of the union.¹ This imperial parliament would have no control over exclusively British affairs, so that it would be necessary to create a separate local parliament for Great Britain similar to those now possessed by the dominions. Mr. Lionel Curtis, a pioneer in the movement, has gone so far as to say that the issue is "whether

¹ Basil Worsfold, "The Empire on the Anvil."

the Dominions are to become independent republics, or whether this world-wide Commonwealth is destined to stand more closely united as the noblest of all political achievements."¹

The Imperial Commonwealth and a League of Nations. The reorganization of the British Empire is a problem the solution of which Americans must watch with the deepest interest. The analogies which the situation bears to that confronted by the Constitutional Convention in assembly at Philadelphia in 1787 are perhaps not sufficiently close to make a comparison instructive, for the American union was between the colony-states themselves, while the Imperial Commonwealth must include within it a dominating mother country which has hitherto been in supreme control. Moreover the dominions and the mother country have separate political and commercial interests far more divergent than those of Massachusetts and Virginia or of New York and Rhode Island in 1787. Of greater present importance is the analogy between the federation of the British Empire and the proposed League of Nations. In an address at the Peace Conference, which has been widely quoted, General Smuts, as delegate from South Africa, spoke as follows: "People talk about a league of nations and international government, but the only successful experiment in international government that has ever been made is the British Empire, founded on principles which appeal to the highest political ideals of mankind. . . . Our hope is that the basis may be so laid for the future that it may become an instrument for good, not only in the empire, but in the whole world." And again, in a draft "plan for a League of Nations" the same eminent statesman carried the comparison into further details, showing that the ultimate authority

¹ "The Problem of the Commonwealth," p. vii. The recognition by the Covenant of the League of Nations of a right on the part of Canada, Australia, New Zealand, and South Africa, to be represented in the Assembly of the League, apart from the objection that it overweights the vote of Great Britain, is in keeping with the actual position held by the dominions in international relations. The representation of India is less justifiable.

of common action in both instances was a conference of the principle constituent states, at which a common policy was to be laid down, to be carried out by the individual governments of the states acting as the executive branch of the League. Further, the administration of the crown colonies and protectorates of the British Empire bore, he said, a close resemblance to the proposed guardianship of the League over the colonies and undeveloped territories formerly belonging to Germany. It is clear that for many years to come the problem of federalism will be one of the most difficult problems of statesmanship, whether within the boundaries of the separate nations, such as Germany, Russia, and the British Empire, or as extending to the nations of the world at large in the endeavor to create an international union which shall constitute a bond of peaceful intercourse without infringing upon the local autonomy of its members.¹

War Cabinets in France. The experience of France in adapting its political institutions to the demands of war bears less directly than that of Great Britain upon the problems confronting the United States, but it is of no less intrinsic interest to the student of government. The outstanding feature was the example set by France of the reality of its parliamentary government in time of war, and the possibility of securing an efficient fighting machine without denying the right of public opinion in and out of the chambers to criticise the Government and to overthrow cabinets as in times of peace. Upon the outbreak of the war the Viviani Cabinet decided to resign, not because of any direct opposition, but in order to permit the formation of a new cabinet comprising the best men of all the several Republican groups. The new Cabinet, of which Viviani

¹ It would be interesting, but outside of the scope of the present volume, to make further comparisons with the proposed solution of the Irish question, by conferring upon Ireland, Scotland, Wales, and England proper the status of local autonomy possessed by the dominions. At the moment of present writing the situation calls for separate treatment of Irish self-government.

remained the head without portfolio, gave representation to the Socialist groups in the person of Jules Guesde. In October, 1915, the Viviani Cabinet resigned under criticism, chiefly from the pen of Clemenceau, of its policy in the Near East in not averting the entrance of Bulgaria into the war on the side of Germany. The succeeding Cabinet was a coalition one, and was equally a departure from fixed traditions as was the Coalition Cabinet in Great Britain. It was formed under the premiership of Briand, and its larger number of twenty-four members permitted the inclusion of leaders of all the political groups, not excepting even the royalist and clerical party. Again Clemenceau attacked from the columns of "*L'Homme Enchaîné*," this time on the ground among others that the new Cabinet was too large and could not reach decisions quickly enough. In December, 1916, the Briand Cabinet was reorganized so as to permit the formation of a small "War Council" of five members, similar to that formed in Great Britain under Lloyd George. In spite of this reorganization criticism continued, and in March, 1917, the Briand Cabinet resigned and two Cabinets of brief tenure followed. That headed by Ribot was discredited by its failure to take action against German propagandists, and that headed by Painlevé fell after being in office but two months, having failed to give representation to the Socialist groups. In November, 1917, Clemenceau, who had been responsible for the fall of so many Cabinets, was called upon to form a new Cabinet of his own, and in spite of the opposition of the Unified Socialists he succeeded in holding the confidence of a majority of the Deputies. His administration was marked by redoubled efforts in the prosecution of the war and by strong measures against the "defeatist" groups, who were suspected of working in the interest of Germany. The Clemenceau Cabinet remained in power until the close of the war, and after carrying through the negotiations of the peace treaty won a substantial victory in the elections of November, 1919.¹

¹ A summary of parliamentary changes during the war may be found in L. Duguit, "*Manuel de Droit Constitutionnel*," 3d ed., p. 201.

Relation of cabinet changes to the national morale. To the onlooker from abroad the rise and fall of French Cabinets might appear as a sign of weakness and offer good reason for doubting the efficiency of democratic institutions in the presence of a great crisis. But it may well be questioned whether the responsiveness of a cabinet form of government to the demands of public opinion did not furnish the French people with an outlet for the tense feelings and strong convictions which the impending danger of defeat aroused, and to that extent steadied the nerves of the nation and made it feel that each change in the Government was but the enlistment in the service of the Government of those best fitted to meet the particular emergency. Undoubtedly the large number of French political parties proved at times an embarrassment, since it became necessary to take into account party affiliation as well as executive ability in making up the membership of the several Coalition Cabinets. That was the price which France paid for the strong note of individualism in her political consciousness. But admitting the existence of numerous groups of divergent opinion in the state, it was far better that they should find representation in the administration than that for the sake of a greater unity of control a large part of the people should have been lacking in confidence in the purposes of the Government. In a war of successive victories the efficiency of a single command might well have justified itself, as it did in Germany, against an unrepresented minority of the people. In a war of defeats and deadlock and of imminent danger continued through many months, it is doubtful whether an executive department not closely in touch with public opinion in all its phases could have held the nation together. The "union sacrée" in which President Poincaré, in his address to the chambers on August 4, 1914, found all parties of the nation combined was only maintained through the long ordeal by casting upon each party a share of the national burden. As the event proved the responsibility was not misplaced.

Parliamentary Government during the war. A second

characteristic of French democracy in the presence of the great crisis was the part played by the legislative body in the conduct of the war. While the British Parliament remained a more or less idle spectator and critic of the work of the Cabinet, the French Chamber of Deputies undertook to exercise its normal legislative functions and to take an active part in directing the administration. For a brief period after the outbreak of the war parliamentary government was suspended, but by January, 1915, it was revived, and from that date on the two houses became practically permanent, the Government having announced that it would not exercise its constitutional power of adjourning them. The great commissions dealing with the army and with foreign affairs were thus able to hold continuous sessions, in spite of the traditional rule of parliamentary procedure and in spite of the special provision of the Constitution. A resolution was adopted by the Chamber in 1916 in which it declared itself "resolved to fulfill its duty of giving a more and more constant and vigorous impulse to the national defense by strict cooperation with the Government." Secret sessions were held in which all of the military, diplomatic, and economic questions raised by the war were examined, and votes of confidence were passed accordingly. While abstaining from interference in military affairs, the Chamber was determined to see that the measures taken to furnish the necessary supplies to the army should be equal to the emergency. In consequence it undertook to give orders to the executive department and to exercise a direct and effective control over all the services of the Government. It is asserted by a number of foreign observers that the commissions of the Chamber rendered valuable service to the Government, and showed the possibility of maintaining intimate and effective relations between the legislature and the executive.¹ On the other hand,

¹ In the following chapter it will be possible to make comparisons with the absence of cooperation between Congress and the Executive of the United States. Congress could criticise, but it could not make its criticism effective by bringing pressure to bear upon the Executive.

in France as in Great Britain, administrative reorganization was considerably delayed, and it was not until December, 1916, that a unified control was established over the production and distribution of food, fuel, munitions, and military supplies.

At the same time the committees of Congress were restricted to the passage of laws conferring general power upon the President and necessarily leaving him a wide discretion in the use of administrative agencies.

PART III

CHANGES IN THE POLITICAL INSTITUTIONS
OF THE UNITED STATES

CHAPTER V

THE WAR AND THE CONSTITUTION

Constitutional unpreparedness of the United States. "Constitutional unpreparedness" is perhaps the best characterization of the situation in which the United States found itself upon its entrance into the war in April, 1917. It was not merely that the country was unprepared in respect to the accumulation of the material resources which were essential to the conduct of a great war; for this form of unpreparedness was not imposed upon the United States by its Constitution, but by its inability to realize the inevitableness of the conflict into which it was driven. No clause of the Constitution prevents Congress from taking such measures as in its judgment are necessary to protect the nation against enemies from without; and had it been the conviction of Congress, following the sinking of the *Lusitania*, that the United States must ultimately be ranged on the side of the Allies, not merely to protect American rights but to champion the cause of international justice, the outbreak of the war might have found a million trained men with equipment at hand and ships ready to convey them to the fighting line. But even such a state of preparedness, while it might have obviated the confusion attendant upon the attempt to do quickly what should have been done deliberately, could not have removed the constitutional difficulties involved in the actual entrance into a state of war.

These constitutional difficulties were inherent in the political institutions of the country, and were the result: first, of the existence of a written constitution defining the powers of the Government and imposing limitations upon it; secondly, of the distribution of the powers of the central government between three distinct and separate agencies; and thirdly, of

the division of the powers of government between the central government and the member states of the Union. The meaning and purpose of these three fundamental features of the Government of the United States has already been pointed out in the sketch of the Constitutions of the great nations on the eve of the war, and it is only necessary here to call attention to the fact that in the description of the steps taken by the United States to meet the demands of the war we shall find ourselves constantly in the presence of constitutional obstructions which at one turn or another brought the forces of the Government to a temporary halt. How these obstructions were overcome without doing open violence to the Constitution we shall see later; but it cannot be denied that they were a serious handicap in the conduct of the war. Time was lost all along the line; the legislative and executive departments worked at times at cross purposes; duplication of functions was frequent; and lack of coordination was a continuous feature of many of the boards and bureaus performing similar duties. So much was accomplished in the end that we are tempted to dwell rather upon the positive results of American participation in the war than upon the delays and shortcomings and extravagances that accompanied it. It is only when we contrast the balance sheet of America's effort with that of autocratic Germany, or even with that of Great Britain with its cabinet form of government, that we realize the cost of a democracy like ours and the disadvantage in which it is placed in time of war.

The Constitution not solely responsible for the shortcomings of the Government. It must be confessed that not all the shortcomings with which the Government of the United States stands charged were due, as we shall see later in detail, to the actual impediments raised by the Constitution of the country. Cooperation was frequently possible between the departments of the central government and between the central government and the states, but failed to exist because of jealousies of one branch of the Government towards another, or

because of the inefficiency of the local officials upon whom pressure could not be brought by the central government. In many instances the interference of Congress with the conduct of the administration was merely the result of a distrust of the particular officials in charge, and of an unwillingness to allow them a free hand which they might well have had without doing violence to the Constitution. As Professor Ford has said, "the administration may be criticised for incompetency, when the true defect was its impotence; and nowhere is the attitude of criticism stronger than in Congress, which is the creator and maintainer of that impotence."¹ The difference in this respect between the position of the British Parliament and that of the United States Congress was that the former body criticised with a sense of responsibility resulting from the fact that the administration was its own delegated body and could be removed from office at any time, whereas Congress, having no direct control over the administration, criticised more recklessly and was reluctant to surrender whatever indirect control it could exercise through the power to define in detail the way in which the administrative departments should perform their duties. Wherever criticism is divorced from responsibility it tends to become destructive rather than constructive.

Difficulties due to traditions of individualism. Apart from weaknesses in the organization of the Government, there was a further handicap under which the Government of the United States labored when faced with the problems of a great war. The people of the United States had never been accustomed to any large measure of governmental interference either in their business affairs or in their private lives; in consequence the Government lacked the organization needed to bring all the forces of the country to bear upon the single object of winning the war. On the other hand the citizen body, in spite of their good will, were unfamiliar with the methods of regimen-

¹ "The War and the Constitution," *Atlantic Monthly*, October, 1917, p. 487.

tation and discipline necessary to the most effective team work. Both defects were in due time made good, but as in the case of Great Britain, whose citizen body had been as little trained in that way as our own, much valuable time was lost in the process of adaptation. From one point of view, however, the unpreparedness of the American people in respect to methods and agencies of cooperation with the Government reflects the highest credit upon them. For their ready response to the demands made upon them and their ability to initiate ways and means, chiefly of a voluntary character, were made all the more manifest by their previous habits of economic and social individualism.

Difficulties due to fundamental personal rights. The traditions of the American people presented an even greater difficulty, for they involved certain fundamental rights which many persons were reluctant to abandon even in the presence of a great emergency. Freedom of speech and of the press, the right of assembly, the right to be free from searches and seizures without warrant, the right to obtain a writ of habeas corpus and to be tried by a jury in a civil court with due process of law, are all rights which must at times obstruct a government at war, owing to the presence of agents of the enemy who would make use of them as a cover for their hostile plans. Yet the importance of those rights, as being of the very essence of free government, led many to hold that it were better to risk the danger of their abuse by foes within the country than to suffer them to be set aside and thus have a precedent established which might operate to lessen the sacredness of those rights in the future. In Great Britain, as we have seen, the traditions of personal freedom were as strong as in the United States, but Parliament, being the maker of the Constitution as well as of the laws of the land, was able to set them aside by its own act, and its judgment was final in the case; whereas in the United States, even had the emergency been the same, certain restrictions placed by Great Britain upon fundamental rights, such as the extension of military

law to the civilian population, would have run counter to the explicit guarantees of the Constitution. Other restrictions placed by Parliament were found equally compatible with a liberal interpretation of our own Constitution.

The Constitution in time of war. *Salus populi suprema lex.* In the presence of a great national crisis, when the welfare of the State is at stake, is the Constitution to remain the supreme law of the land? And if still the supreme law, does this connote that its provisions must necessarily cover by implication every power which the Government at war will be called upon to exercise, even where the letter of the law may seem to fall short of conferring the actual power required? Congress is a body possessing only such powers as are enumerated in the Constitution; all other powers are reserved to the states which compose the nation. But Congress is at the same time the body which declares war and is under the Constitution responsible, together with the President, for the successful prosecution of it. May it therefore assume such powers as belong to the Government of a unitary sovereign nation, on the theory that the reserved rights of the member states would otherwise be in danger of extinction? Moreover, there are restrictions imposed upon Congress by the Amendments guaranteeing the inviolability of the fundamental rights of citizenship. Do these guarantees continue to hold in time of war, or may they be set aside where the emergency demands it? Must freedom of speech and of the press, the right of assembly, and the immunity from searches and seizures without warrant, yield to the urgent need of national unity in time of war? Or on the other hand are there limits beyond which Congress cannot go in restricting individual liberty, so that legislation passed under guise of the war powers may be contested as not being properly within them? If restrictions upon personal liberty are permissible, may the judgment of Congress as to the needs of the situation be questioned by the judicial branch of the Government? These questions may seem to have an academic character, but it must be remembered on the one

hand that the Government of a federal state is only possible by a jealous maintenance of local self-government against the inevitable encroachments of federal control, and on the other hand that insistence upon national unity in time of war by various forms of coercion tends to perpetuate itself after the emergency has passed, so that in both cases any concessions of unlimited power to the Government in time of war must act as dangerous precedents for a continued exercise of such powers in time of peace.

Congress as the legislature of a sovereign state. It must be conceded that there is some warrant for holding that the power of Congress in time of war rises superior to any constitutional limitations. In a case involving the right of Congress to forbid the entrance of Chinese into the United States, the Supreme Court, after arguing that the right to exclude or expel aliens was an inherent and inalienable right of every sovereign and independent nation, spoke as follows: "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."¹ But if this is true with respect to restrictions upon immigration how much more true with respect to that most vital right of every sovereign state, the right to defend itself with all its forces against an enemy state? An even more pertinent argument is to be found in the Second Legal Tender case, in

¹ *Fong Yue Ting v. United States*, 149 U. S., 698. In his comment upon this case Professor Willoughby makes the following remarks: "In short, it may be stated as an established principle of our constitutional law that the supreme purpose of our Constitution is the establishment and maintenance of a State which shall be nationally and internationally a sovereign body, and, therefore, that all the limitations of the Constitution, express and implied, whether relating to the reserved rights of the States or to the liberties of the individual, are to be construed as subservient to this one great fact." "The Constitutional Law of the United States," Vol. I, p. 65. This nationalistic interpretation of the Constitution is, however, questioned by other writers.

which the Supreme Court passed upon the right of Congress to make treasury notes legal tender during the financial crisis of the Civil War. In 1862, when the treasury was low and other forms of raising money were inadequate to meet the demands made upon the Government, Congress authorized the issue of half a billion dollars of paper money, based only upon the credit of the Government and made valid for the payment both of taxes and of private debts contracted before the passage of the act. The act was at first declared unconstitutional, but was upheld in a later case and justified as the legitimate exercise of war powers.¹ In a concurring opinion rendered by Justice Bradley the argument was made that "the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments. . . . Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions." The Justice himself had some doubt of the validity of his reasoning, for he asserted that "if this proposition be not true" Congress had express authority to make such laws under the clause of the Constitution giving it the power "to make all laws necessary and proper" for carrying into effect the powers specifically enumerated. The danger involved in the argument of Justice Bradley is that to concede to Congress the powers belonging to the legislature of a sovereign state is to break down the traditional doctrine, sanctioned by a long line of judicial decisions, that the United States is in all its operations a government of enumerated powers,

¹ Knox v. Lee, 12 Wallace's Reports, 457.

and thus to open the way for a centralization of authority in Washington which would make serious inroads upon the constitutional rights of the states of the Union.¹

War powers without restrictions. A more recent assertion of the unlimited powers of the Government in time of war comes from the pen of a strong nationalist. Senator Sutherland draws a distinction between the canons of constitutional interpretation to be applied in times of peace and the "assumptions" and "constructions" necessary in time of war; and he upholds the position taken by Justice Strong in the Second Legal Tender case, where, as we have seen, a very wide interpretation was put upon the powers of Congress, quoting with approval the statement of the court that "it is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times." Justice Strong was careful, however, to base his justification of the Legal Tender Acts upon the urgent necessities of the "time" and the "circumstances" under which "Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed and, indeed, for the preservation of the Government created by the Constitution." Senator Sutherland seems to be ready to dispense even with the necessity of making inferences from powers actually granted, and believes that the power of the general government in time of war to sharpen the sword and strengthen the purse "exists without any restrictions whatsoever" save such as are imposed by other express prohibitions of the Constitution. Even these restrictions may be suspended when "they conflict with the paramount powers of war." He frankly faces "the alternative of violating the Constitution, or sacrificing the Republic," and repeats and applies to the existing situation (in 1917) the words of Lincoln in 1864: "I felt that measures, otherwise

¹ This centralization of authority in what may be regarded as national matters might indeed have its advantages; but the issue is one of such importance that it should be squarely faced.

unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the Union.”¹

Inferences from the power “to raise and support armies.” It may seem an over-subtle distinction to make, but it is sounder constitutional law to justify the broad powers assumed by Congress during the war by inference from the war clauses of the Constitution. After giving Congress the power to declare war, the Constitution in the following clause gives Congress the power “to raise and support armies,” and in the next clause the power “to provide and maintain a navy.” Other secondary powers are granted relative to the organization and regulation of the forces thus raised. To these express powers must be added the implied powers contained in a subsequent clause of the Constitution granting power to Congress “to make all laws which shall be necessary and proper for carrying into effect the foregoing powers.” Are not these terms sufficiently inclusive to embrace by inference every power which in the judgment of Congress might contribute to the strengthening of the fighting arm of the nation, without going to the extent of conferring upon Congress authority which might encroach, as by sovereign right, upon the self-governing powers of the States or the liberties of the individual citizen? The actual grant of power to Congress is comprehensive and unrestricted, and it is a striking feature of a Constitution, which in other matters imposes so many limitations upon the governing bodies, that in respect to the conduct of war it leaves them such a free hand. If its framers deliberately hedged in the departments of the Government with restrictions in the conduct of domestic affairs in time of peace, they at least showed no intention of placing any direct impediments upon the Government when confronted with enemies from without. As Hamilton observed at the time, the powers essential to the common defense “ought to exist without limitation, because it is impossible to foresee or define the extent

¹ “Constitutional Power and World Affairs,” pp. 92-99.

and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."¹ His argument was, however, based upon powers actually granted, not upon an assumption of national sovereignty which would have been repudiated by the great body of his readers.

War powers and State rights. But if the Constitution has seen to it that Congress shall not be limited in the means which it may take for the successful prosecution of war by reason of want of adequate power to act, it has left to be settled by inference how far limitations may arise in consequence of a conflict of the war powers of Congress with other clauses of the Constitution. Where the conflict is with normal powers exercised by the States the inference would seem clear that the latter must give way. For the powers "reserved" to the States by the 10th Amendment are all those which have not been expressly delegated to Congress, and it is not difficult to conclude that in so far as the powers of Congress are necessarily enlarged in time of war the powers reserved to the States are to that extent restricted. As we shall see in a subsequent chapter, the recent war led the Federal Government to enter many portions of the field of normal state legislation which were completely closed to it in times of peace. With the completion of demobilization these direct encroachments came to an end, but the Federal Government has continued to exercise a number of activities which are outside of its normal range, but which have not been contested by the States because of the obvious advantage of federal action under the circumstances.

Individual rights in time of war. The situation with regard to encroachments upon the fundamental rights of citizenship is a more difficult one to adjust. As a general principle it may be stated as the accepted law that the constitutional guarantees of personal rights are not absolute, but conditional guarantees. This is true, as we have seen, even in times of

¹ "Federalist," No. 33.

peace, and is obviously all the more true in time of war when the conditions which may call for a restriction upon personal rights are so much more urgent. Two questions are thus presented: are the war powers of Congress so far paramount as to suspend altogether the rights guaranteed by the Constitution; And if not, then is it within the legislative judgment of Congress to decide whether the necessity exists for suspending those rights in whole or in part, or is the judicial branch of the Government the ultimate arbiter? In answer to the first question it may be stated in the language of a recent decision of the Supreme Court, in which the validity of war-time prohibition was at issue, that "the war power of the United States, like its other powers and like the police powers of the States, is subject to applicable constitutional limitations."¹ The controlling precedent upon this question is the important case of *Ex parte Milligan*,² decided in 1866, in which a majority of the court distinctly repudiated the possession of any absolute war powers by Congress such as would give it the right to set aside trial by jury in the case of a civilian who had committed an offense against the criminal law. "The Constitution of the United States," said the court in this case, "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority." It follows from this ruling that the answer

¹ *Hamilton v. Kentucky Distilleries and Warehouse Company*, decided December 15, 1919.

² 4 Wallace's Reports, 2.

to our second question must be that it is for the courts of justice to decide whether the circumstances arising out of the war are such as to authorize the suspension of fundamental rights. Congress may not, therefore, by its mere legislative decree, create a necessity in law which does not exist in fact, so that in each case the presumption is in favor of the continuance of the enjoyment of fundamental rights in time of war, and the burden is upon the Government to prove that the restrictions placed by Congress were actually called for by the public need.¹

¹ Specific application of this principle will be found in the cases discussed in connection with the enforcement of the Espionage and Sedition Acts. See below, pp. 171-173.

CHAPTER VI

WAR POWERS OF THE PRESIDENT

Powers of government and administrative organization separately treated. In proceeding to examine the actual changes introduced into the Government of the United States as a means of adapting itself to the demands of the war, it will help to present the situation as a political issue if we treat separately the extension of the functions of government into new fields of activity and the administrative organization created to carry into effect the duties thus assumed. It will thus be possible to distinguish between defects in the political machinery due to want of power in the executive department to take the necessary action, and defects due to lack of proper administrative agencies by means of which the powers actually granted could have been exercised to best advantage. The questions arising in connection with the functions of government relate mainly to the new legislation passed by Congress to meet the emergency. This new legislation endowed the President with a wide range of powers and enabled him as chief executive to bring the resources of the nation to bear upon the support of the armies of which he was commander-in-chief. It will help to clear the ground for a discussion of these new executive powers if we consider first the scope of the war powers conferred upon the President by the Constitution independently of any auxiliary legislation on the part of Congress.

The President as commander-in-chief of the army and navy. By the Constitution the President is made "commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual

service of the United States." In pursuance of this power the President has authority to perform all those functions which by their nature belong to the position of commander-in-chief. What those functions are the Constitution does not define, and it is only by inference that they can be held to include such duties as relate to the planning of campaigns, the disposition of military and naval forces, the direction of operations, and the execution of the provisions of military law. The distinction between the war powers of the President and those of Congress is well brought out in a concurring opinion rendered in the case of *Ex parte Milligan*, in which the Supreme Court passed upon conditions arising during the Civil War. "Congress has the power," said the four members of the court, "not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions." No more in war than in peace may the President intrude upon the proper authority of Congress nor Congress upon the proper authority of the President. "Both are servants of the people, whose will is expressed in the fundamental law."¹ The re-

¹4 Wallace's Reports, 2. The distinction is further elaborated by Professor Fairlie as follows: "It is thus difficult, if not impossible, to draw a strict line of demarcation between the authority of Congress and that of the President. But the general principles of demarcation can be indicated; and in practice there have been very few conflicts. Congress regulates what is of general and permanent importance, while the President determines all matters temporary and not general in their nature. Thus Congress authorizes the total number of men in the army, their distribution among the different branches of the service, the number and kind of arms, the location and character of forts; and the President, as chief executive, must carry out

strictions upon the control by the President of the appointment of the officers of the army and navy are the result of another clause of the Constitution which provides for the appointment by the President, with the advice and consent of the Senate, of ambassadors, judges, and "all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law." As a matter of fact, however, Congress, acting under a subsequent clause of the same paragraph empowering it to "vest by law the appointment of such inferior officers, as they think proper, in the President alone," has not only made it a matter of form to confirm the nominations of the President to the higher posts in the army and navy, but has authorized the President to appoint subordinate officers without sending their names before the Senate.

The President's authority over the state militia. It is a curious feature of our federal system of government, viewed from the standpoint of the present day, that while the power to organize, arm, and discipline the militia was given to Congress, the Constitution reserves to the several States the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. The purpose of the provision was to secure uniformity in the training of the militia, without arousing the fears of the States that the militia, when placed under the direction of the national authority, might be "rendered subservient to the views of arbitrary power."¹ The result of the provision is, however, that when the statutes on these matters. But the President, as commander-in-chief, decides where the different parts of the army and navy are to be stationed and moved, the strength and composition of garrisons and field forces, and the distribution of arms and ammunition. Congress has power to declare war (although hostilities may commence without such a declaration), and decides what means it will grant to conduct the war; but the President decides in what way the war shall be conducted, directs campaigns and establishes blockades, and also may do whatever is necessary to weaken the fighting power of the enemy." "The National Administration of the United States of America," p. 33.

¹ "The Federalist, No. 29.

war breaks out and the President, under the authority of Congress, calls forth the state militia to assist the Government in the prosecution of the war, he finds at his disposal a body of men disciplined according to a uniform system, but commanded by officers who may in many cases be entirely unfit for the duties they are called upon to perform. It then becomes necessary, as at the beginning of the present war, for the federal military staff to institute an investigation and examination directed towards the elimination of the appointees of the States who do not measure up to the standards in force in the "regular" army. The troops themselves constituting the militia pass completely under federal control when once called into service.

Political powers assumed by the President during the Civil War. The powers exercised by the President as commander-in-chief of the army and navy are strictly military powers and cannot be used outside of that restricted field. There are, is it true, precedents to the contrary created during the Civil War when the President assumed the power to declare martial law and to exercise other political powers not specifically conferred upon him. While President Buchanan felt himself powerless to act, in the absence of authority from Congress, to compel the seceding States to obey the laws of the Union, President Lincoln acted with fewer scruples as to the powers of his office. The most striking instance of his arbitrary interpretation of his duties as chief executive was in connection with his attempts to suppress opposition to the policies of the Government from persons in the North who sympathized with the cause of the Southern States. Secret service agents of the Government undertook to search private houses without warrant in spite of the provisions of the Constitution, and large numbers of citizens, including editors, judges, and members of a state legislature, being suspected of disloyalty, were arrested by military order and confined in prison. The President thereupon proclaimed the suspension of the writ of habeas corpus, interpreting the Constitution as

giving that power to the Executive, and the protest of Chief Justice Taney proved unavailing. Subsequently Congress, by the Habeas Corpus Act of 1863, formally sanctioned the military courts and authorized the President to suspend the writ. It was only when the war was over and the emergency had been met that the Supreme Court of the United States entered a judgment to the effect that neither the President nor Congress had any power under the Constitution to declare martial law and set up military courts for the trial of civilians in regions "where the courts are open and their process unobstructed." "Civil liberty and this kind of martial law," said the court, "cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish."¹ While the question whether the President may constitutionally suspend the writ of habeas corpus upon his own initiative has not been passed upon directly by the Supreme Court, the weight of authority appears to be that he cannot do so, but must await authorization from Congress. The suspension of the writ does not of itself affect the jurisdiction of the civil courts or the application of the common law.

Political powers exercised by President Wilson. During the recent war the President wisely refrained from exercising the arbitrary powers assumed by President Lincoln during the Civil War. It is true that the emergency was not as great, for while there were numerous agents of the enemy upon the soil of the country and numerous sympathizers ready to aid and abet them, yet the United States was sufficiently far removed from the theater of the conflict to be able to bring offenders to terms by the normal processes of the law. But while the President did not assume any such extraordinary powers, he used the collateral powers of his office to obtain what political advantage he might over the enemy. In this respect his policy offers a parallel to Lincoln's Emancipation Proclamation, except in that Lincoln's act was without constitutional warrant. Having no authority from Congress, and acting solely in his

¹ Ex parte Milligan, 4 Wallace, 2; 1866.

character of commander-in-chief, Lincoln issued on September 23, 1862, a proclamation freeing the slaves in the enemy states. The proclamation was in form a war measure and affected only those states not occupied by the Union forces. Its obvious design was to weaken the enemy; but underlying this purpose was the intention of the President, who had previously made the question of slavery subordinate to that of preserving the Union, to create a new and higher moral issue which might serve as a standard around which many in the North who were lukewarm in their support of the Union might rally. It did in fact have this effect in the end, but at the time of its issue it seemed that the President had misjudged public opinion, for the elections which followed resulted in anti-war majorities in a number of the Northern states which previously had been strongly Republican. But henceforth the war became not merely a war to save the Union but a war to free the slaves, and on the strength of that new issue the federal armies assumed the rôle of liberators rather than of conquerors.

Grounds of war, and objects sought by it. Whether with conscious or unconscious political motives, the same necessity of rising from technical grounds to a higher plane of moral appeal was impressed upon President Wilson from the very beginning of the war. The distinction between the legal issues upon which the United States was led to abandon its position of neutrality and declare war upon Germany and the ideals which were set before the people as the object to be accomplished by the war is a striking commentary upon the illogical character of the international law which prevailed in 1917.¹ But our present interest is in the use by President Wilson of his constitutional position as spokesman for the United States before the world to create popular support for the war which the technical grounds of the conflict might have been inade-

¹ Thus, it is difficult to understand how a nation could remain neutral in the presence of international crime so long as it was not itself the victim, and yet make the redress of that crime part of its war aims once it had been brought into the war because of a violation of its own rights.

quate to win. The address of the President to Congress on April 2, 1917, calling for a declaration of war against Germany refers to the renewal of the submarine warfare without any restrictions, and recites the wrong done to the United States in the persons of its citizens and in its property. Congress was then advised to declare that the acts of Germany constituted war against the United States, and to accept the status of belligerency thus thrust upon it. The rest of the address develops in detail the "motives" and the "objects" of the United States in entering the war. "Our object now, as then, is to vindicate the principles of peace and justice in the life of the world as against selfish and autocratic power, and to set up among the really free and self-governed peoples of the world such a concert of purpose and of action as will henceforth ensure the observance of those principles. . . . We are glad . . . to fight thus for the ultimate peace of the world and for the liberation of its peoples, the German peoples included; for the rights of nations, great and small, and the privilege of men everywhere to choose their way of life and of obedience. The world must be made safe for democracy." No one will doubt the power of the President's appeal at the time it was made. It aroused the spirit of the crusader in the minds of thousands who would have responded but lukewarmly to the call to defend American commerce against the illegal German blockade, and it sanctified as it were the narrower spirit of patriotism and transformed it into devotion to the cause of humanity itself. Europe heard the appeal and new heart was infused into the ranks of the Allies. For the President's voice was the voice of America, as the voice of no other public man could have been.

The recognition of new states. In one other important respect President Wilson used his constitutional position as spokesman of the nation in the conduct of foreign affairs to assist the cause of the armies in the field. Having proclaimed it as one of the objects of the war to secure the liberation of oppressed peoples on the principle of the self-determination of distinct national groups, the President followed the policy of

encouraging several of those groups to break away from their allegiance to Austria and to declare their independence while the war was still in progress. The negotiations looking to this result could not, of course, be carried on with the duly elected representatives of those peoples, since the condition of war precluded an organized movement on their part. It was, however, possible in the case of the Czechoslovaks to have dealings with a National Council having headquarters at Washington and Paris; and in September, 1918, Secretary Lansing communicated to the President of the National Council the recognition by the United States of the belligerency of the Czechoslovaks and the recognition of the National Council as the *de facto* government. The official recognition of an absentee government in command of a number of distinct armies fighting against the nation of which their territory was still a *de facto* part, and to which their brethren in Bohemia, Moravia, and Slovakia were still rendering a formal allegiance, was of a unique character in the history of international law. The traditional rule of international law has been that a new nation will be recognized by the existing members of the family of nations only when, after successful revolution against the state of which it was formerly a part, it has given evidence of its ability to maintain itself. In most cases the new community is recognized as a *de facto* belligerent before its final recognition as a *de jure* state is accorded. In every instance the claimant for international recognition must have obtained possession of definite territory and must have organized a government capable of giving expression to the will of its people. But in the case of the recognition of the Czechoslovak nation these conditions were not fulfilled. In the case of the Jugoslavs semi-official recognition was given as early as May 29, 1918, when the Department of State announced at the time of the Congress of the Oppressed Races of Austria-Hungary held in Rome, "that the nationalistic aspirations of the Czechoslovaks and the Jugoslavs for freedom have the earnest sympathy of this government." But owing to the internal difficulties

attending the composite character of the new state, no further steps could be taken in the direction of recognizing its *de facto* independence until the meeting of the Peace Conference in Paris.

The President as the agent of Congress. In addition to the powers conferred upon the President by the Constitution in respect to the army and navy and the conduct of the foreign affairs of the country, there is the great body of war powers which he exercises in pursuance of authority conferred upon him by Congress. By the Constitution the "executive power" is vested in the President and he is called upon to "take care that the laws be faithfully executed." He is thus made, in respect to these executive functions, as it were the agent of the legislative body for the purpose of enforcing its decrees, and by the letter of the Constitution he is supposed only to act where there is a definite law to be enforced. While it was not originally intended that the administrative departments of the Government, except in respect to political functions, should be under his direct control and the heads of these departments subject to his personal direction, the obvious impossibility of having the President responsible for the execution of the laws without having a voice in the manner in which the laws were being executed led to his gradual assumption of control over the departments, and to the acquiescence both of Congress and of the courts in the exercise of such authority. The result was that while Congress continued to prescribe in considerable detail the organization of the administrative departments and the duties of the heads of the departments, the President came to exercise control, backed by his power of removal from office, over the performance of their duties by the administrative heads, and thus became in actual practice the head of the administrative system.¹

Power of the President to issue regulations. The position of the President as administrative chief has been greatly

¹ See W. W. Willoughby, "Constitutional Law of the United States," II, pp. 1156-1159.

strengthened by the wide latitude allowed by Congress to the Executive in framing the "regulations" by which the provisions of various acts are to be put into effect. While Congress has the power to frame its legislation so as to cover the most minute details, it must under ordinary circumstances limit the terms of the law to a statement of general principles and their more important applications, and is obliged to delegate to the Executive the power to define the conditions under which the provisions of the law shall be effective. The result has been the growth of a great body of executive regulations, some of them in the form of legal codes, governing the administration of the several departments of the Government. These regulations are for the most part expressly authorized by Congress, and may be issued either by the President or more often by the heads of the respective departments. In other cases executive regulations are issued by the President or by subordinate administrative officers in the exercise of an authority implied from the nature of the law to be executed or the duty to be performed by the administrative departments. In Great Britain it was found necessary at the beginning of the war to increase greatly the scope of "orders in Council," which the Cabinet as the executive body of the Government might issue to meet contingencies which could not have been foreseen by Parliament. Thus we have seen that the Defense of the Realm Act was followed by a series of "regulations" ten times the length of the original act, which, considering the importance of its subject-matter, was remarkably brief. So too, in the United States, Congress found it necessary to confer upon the President even more liberal powers in the issuance of executive regulations than had been previously exercised by him. For example, the Food and Fuel Control Act authorized the President among other things to "fix the price of coal and coke and to establish rules for the regulation of their production, distribution, and storage"; and it provided that if in the opinion of the President any producer failed to conform to the regulations his plant might be requisitioned by the Presi-

dent and operated during the period of the war. The significant feature of these "regulations" is that in many cases the penalties of the law attached to the violation of them in their specific terms. In both Great Britain and the United States this is a departure from the traditions of Anglo-Saxon law, which require that in criminal statutes the offense to which the penalty is attached shall be defined by the legislature in the most specific terms possible. So great were the powers possessed by President Wilson that for the time his position was one of virtual dictatorship over a wide field covering whatever activities of the people might in the opinion of Congress be made to contribute, whether affirmatively by regulation or negatively by prohibition, to the strengthening of the military arm of the government.¹

Executive acts without warrant from Congress. Moreover, the power of the President as chief executive in many cases went beyond the limits of statutory authorization. In theory the President can only act in so far as the legislative body has, by its enactments, given him laws to execute. Unless Congress has specifically given him power to act, his hand is stayed. But in actual practice Presidents have frequently undertaken to issue instructions and to take executive action in cases where there was no specific statutory provision covering the case. In these instances they have interpreted their constitutional obligation to "take care that the laws are faithfully executed" as authorizing them to resort to measures of enforcement not contemplated by Congress because of its failure to anticipate the particular need. When the free passage of the mails was being impeded by a strike of railway employees in Chicago in 1893, President Cleveland considered himself authorized to call out the federal troops to remove the obstruction, even though no provision had been made for such

¹The extent to which executive regulations, in the form of supplementary laws, have come to control the public administration of the United States may be gathered from an article by Professor J. A. Fairlie, "Administrative Legislation," "Michigan Law Review," January, 1920.

action. In like manner the Attorney-General of the United States authorized in 1889 the appointment of a United States marshall for the purpose of protecting a federal judge in the performance of his official duties, although there was no law of Congress providing for such protection; and the action thus taken by the Department of Justice was upheld by the Supreme Court of the United States as being within a just interpretation of the constitutional obligation of the President.¹ The court put to itself in this case the important question whether the executive duty of the President is "limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution?" The question was answered by the court in the affirmative in so far as the special issue before it was concerned. As a general proposition, however, the interpretation of the executive power of the President suggested by the court would constitute a serious encroachment upon the comprehensive legislative powers assigned to Congress. For it is to Congress that the Constitution gives the power "to make all laws which shall be necessary and proper for carrying into execution" not only the powers granted to Congress itself but all other powers vested by the Constitution in any department or officer of the government.

Wide scope of the executive power. The result of the transfer by Congress to the President of the express authority to make executive regulations, and of the authority assumed by the President in other cases either from an implied authorization of Congress or directly from his constitutional functions, is that it is difficult at times to trace the precise source from which the President derives his power in a given case. The point might be regarded as of no particular consequence in normal times, but becomes one of considerable interest in time

¹ In re Nagle, 135 U. S., 1.

of war when great pressure is brought to bear upon the executive branch of the Government to undertake functions which are believed necessary to meet the emergency, but which have not been directly authorized by Congress. An examination of the wide range of activities entered upon by the Government during the recent war will disclose many assertions of power by the executive branch for which only the remotest statutory authorization can be found. The steps taken by the President to bring about an amicable adjustment of the relations between labor and capital in respect to war industries, and particularly the creation of the Committee on Public Information, are instances of such executive action. In the following pages which describe the legislation adopted by Congress to enable the President to prosecute the war more effectively, we shall find the President at times acting in pursuance of powers directly conferred, at times exercising powers implied from the existence of the administrative departments and the change in their functions necessitated by the circumstances of the war, and again at times exercising powers for which there was no direct or indirect statutory authorization, but which might be inferred from the general constitutional position of the President as chief executive. That the sum total of the powers thus exercised constituted an enormous accession of executive control over the life of the country is manifest to the observer at every turn. The need was urgent, the President endeavored to meet the demand, Congress acquiesced with more or less protest according to the circumstances, and the public at large, having principally in view the winning of the war, gave its approval without regard to the technicalities of constitutional law.¹

The Committee on Public Information. One of the most important of the executive agencies established by the Government for the more successful prosecution of the war was the

¹ The powers of the President will be further discussed in connection with the organization of the government in time of war and the relation of the executive department to Congress. See below, p. 185.

body known as the Committee on Public Information. On April 14, 1917, the President issued an executive order creating this committee and appointing as members of it the Secretaries of State, War, and the Navy, together with a civilian, Mr. Creel, as executive head of Committee. Its general purpose was to control the publication of information of a military character, acting in this capacity as a sort of censorship board, and on the other hand to act itself as an organ of publicity by giving out authoritative information on those matters which it was believed could be safely made public. We shall see below that the several attempts made to have Congress adopt legislation authorizing a censorship of the press failed in the presence of the traditional principles of the American people in that matter; but that upon the failure of a compulsory censorship a voluntary system was acquiesced in by the press in the form of the submission of doubtful news to the Committee on Public Information for its advice. On its part the Committee prepared for the press a statement of the character of the news which the Government deemed it hurtful to be given publicity, and appealed to the patriotism of the press to support the program of the Government. At the same time a Division of News was created to furnish the smaller newspapers with a weekly summary of current war news.

Educational work of the Committee. Apart from its relations to the press the Committee on Public Information undertook to carry on a nation-wide educational propaganda, which proved to be a most valuable means of rallying the people to the support of the Government. Pamphlets were issued setting forth the grounds upon which the United States was led to declare war against Germany, the objects and aims which the United States had in view as the result to be attained by a successful war, and the character and conduct of the Government against which the United States was fighting.¹ These

¹ "How the War Came to America" and "The War Message and the Facts Behind It," to cite the titles of but two of the series, contain a review of the historical policy of the United States in respect to

pamphlets were widely distributed, and were supplemented by articles written by prominent writers and syndicated in the representative newspapers of the country. A daily Official Bulletin was published in which authoritative information was given of the military and civil activities of the Government, and which was displayed in the post-offices of the country and circulated at a minimum price. A Division of Four-Minute Men was established by means of which the voluntary services of speakers were engaged for brief addresses during the intermissions at motion-picture theaters; while photographs were taken and motion-picture films prepared as a means of describing in a more graphic way the work of the various branches of the government. At the same time the volunteer services of artists and of advertising agencies were enlisted for the purpose of educating the public by means of posters, cartoons, and newspaper advertisements. The remarkable unanimity, considering the diversity of the population of the United States in race and traditions, with which the public responded to the demands made upon them by the Government must be ascribed in no little part to the educational campaign thus conducted.

Criticism of the work of the Committee. It is easy, after the event, to point out the defects in the work performed by the Committee on Public Information. On the credit side of its account it may be said that, considering the wide range of duties undertaken by the Committee, its work was on the whole accomplished with considerable ability and energy. The task which it set to itself was a difficult one, but the Committee was able to enlist the services of so many willing and competent volunteers that within an exceptionally short time it came to be a sort of university extension bureau drawing to its courses the entire citizen body of the nation and bringing within its curriculum every aspect of general knowledge bearing upon foreign questions and an explanation of the new development of our policy during the period from August, 1914, to April, 1917, together with an annotated text of the President's message calling for a declaration of war by Congress against Germany.

the war. At the same time, regarding the Committee as a government institution and judging it upon that basis, it must be emphasized that the mistakes which it made on a number of occasions were so serious as to serve as a warning against resort to such agencies in the future without a much more careful determination in advance of the character of the work they are to perform. To convey knowledge and to carry on propaganda are incompatible functions; yet this was the dual aim which the Committee appeared to have in view in many of its appeals to the public. An agency of information which has the sanction of the Government behind it cannot properly follow the methods of the partisan editorial writer. While the pamphlet publications of the Committee were in most cases the work of scholars who sought to state the truth with no more bias than is inseparable from articles written with a political purpose, other means of imparting information resorted to by the Committee, such as newspaper advertisements and in a lesser degree its own Official Bulletin, frequently distorted the truth in the effort to produce the proper impression upon the thoughtless and the uneducated. Propaganda such as the publication of the Sisson documents, relating to the relations between the Bolsheviki and the German Government, without more careful examination of their authenticity, helped to discredit the work of the Committee in other fields.

Need of an agency of general information on political problems. A Committee on Public Information, properly conducted, is a need of peace as well as of war. The work of the Creel Committee, which discontinued its activities shortly after the signing of the armistice, gave valuable evidence of the possibilities of useful service contained in such an agency. In the first place it showed a way of reaching the great body of the people to obtain their cooperation with federal, state, and city agencies in matters, such as those relating to the public health and the conservation of natural resources and food supplies, in respect to which the administration and enforcement of the law are impossible without the intelligent support

of those who are to benefit from it. In the second place, although it did not meet the need, it suggested a way in which the public may be given precise information with regard to the facts involved in a number of problems before the country. More and more public opinion is being called upon to act as a court of arbitration in disputes between employers and employees in matters where the public convenience is vitally involved. In the case of the strikes in the steel mills and in the coal mines in October and November, 1919, the issues involved were in a very real sense brought before the court of public opinion for settlement, and public opinion was obliged to render its decision without having at hand an impartial statement of the facts upon which the conflicting claims were based. The present technical bulletins issued by the separate departments of the administration do not meet the need.

CHAPTER VII

EMERGENCY LEGISLATION ADOPTED BY CONGRESS

Legislation in aid of the mobilization of the national resources. The Selective Service Act. Coming down to details of the actual powers assumed by Congress under its constitutional authority to "raise and support armies," we may consider first the legislation passed with the object of mobilizing all the resources of the country for the prosecution of the war, and secondly the legislation passed with the object of preventing interference with the conduct of the war. First in importance among the laws providing for the mobilization of the national resources was the Selective Service Act, approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States." The circumstances attending the passage of the act are an illuminating commentary upon the theory of the separation of the powers of government.¹ On April 5th the Secretary of War laid before Congress a bill prepared by the General Staff and approved by the President, providing that the regular army and the national guard should be brought to full war strength, and that 500,000 men (with an additional 500,000 when it should be found necessary) should be raised by a selective draft. It so happened, however, that the Democratic chairman of the Committee on Military Affairs in the House of Representatives was opposed to the principle of the draft, so that the ranking Republican member, a German by birth, had to be called upon to steer the bill through the House. At the same time both the Speaker of the House and the Democratic floor leader, who was chairman of the Committee

¹ See above, p. 21.

on Ways and Means, attacked the bill, the former declaring that "conscript" and "convict" were synonymous in the mind of the people. In spite of these obstacles the bill finally passed by large majorities in the Senate and in the House, and after three weeks' delay necessary to secure an agreement between the two houses on matters of detail, was sent to the President in a form not differing greatly, except in the age limits of liability to service, from the original bill presented to Congress.¹

Verdict of the Supreme Court upon its constitutionality. Doubts as to the constitutionality of the act had been expressed by its opponents during the debates in Congress preceding its adoption; and following its enactment formal suit was brought in the federal courts to have it declared unconstitutional. A number of separate suits were consolidated, and by being advanced on the court dockets they reached the Supreme Court of the United States at the opening of the October term in 1917.² The chief objections raised against the act were that the Constitution did not authorize raising armies by compulsory draft, that there was no constitutional authority for sending citizens, especially the militia, to serve on foreign soil, and that enforced military service constituted the involuntary servitude forbidden by the 13th Amendment. In answer the court stated that the denial that the power to raise armies included the power to exact enforced military duty "challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power." "It may not be doubted," said the court, "that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to com-

¹ The act was subsequently amended so as to include persons between the ages of 31 and 45, but in other respects remained unchanged.

² *Arver v. U. S.*, 245 U. S., 366.

pel it." The second objection was considered at length, and the court made a careful distinction between the armies which Congress might raise and the militia whose duties appeared to be limited to defense against foreign invasion. Once the militia were called into national service any limitations upon their use disappeared. Moreover, the 14th Amendment "broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contention made." The objection relating to involuntary servitude was dismissed as being "refuted by its mere statement." In like manner the argument that the exemption from military service in the strict sense of members of religious sects whose tenets excluded the moral right to engage in war amounted to "an establishment of religion," as prohibited by the Constitution, was dismissed as unworthy of notice.

Comparison with the Draft Act of 1863. It is instructive to compare the Selective Service Act with the provisions of the draft law passed by Congress during the Civil War. The act of March 3, 1863, contained a clause permitting persons drafted to furnish a substitute or to obtain exemption on payment of \$300. The constitutionality of the act was never passed upon by the Supreme Court of the United States, nor by any state court except that of Pennsylvania, which upheld the law. But it is more than probable that had a similar law been passed in 1917 the features above mentioned would have been sufficient to warrant the court in declaring it unconstitutional. For the two exemptions in favor of those able to raise the required sum of money would appear to be in clear violation of the 5th Amendment of the Constitution, which requires that no person shall be "deprived of life, liberty, or property, without due process of law," the phrase "due process of law" being now interpreted as including not only the customary forms of judicial procedure, but also certain substantive prin-

ciples of justice, such as equality before the law; so that any legislative act of a clearly arbitrary and oppressive character would be declared unconstitutional by the court, as being of the same practical effect as an arbitrary and oppressive decision of the courts themselves. The scandals which attended the operation of the draft law of 1863 are one of the dark pages of the records of the Civil War. "Bounty-jumpers" in large numbers failed to enlist after they had received a bounty to do so, and "substitute brokers" handled on a commission basis the business of providing substitutes at fixed rates. Accusations of dishonesty were frequently made against officers and physicians who were in charge of the enlistments. In some instances, as in the case of the Democratic enrollment districts of the East-side of New York, the allotments were in excess of due quotas, while the law fell heavily upon the foreign-born population of the cities, who were unable to furnish substitutes or to purchase exemption. By contrast, the Selective Service Act was not only rigid in its provisions for equality of treatment of all ranks of society by prohibiting the payment of bounties or the furnishing of substitutes, but its operation was attended with an insignificant number of charges of dishonesty on the part of the draft boards which passed upon the qualifications of the persons selected. Priority of selection from among the entire number of persons drafted was decided by lot.¹

Legislation for the protection of men in the military service. Having provided for the raising of an army adequate to the nation's needs, Congress at the same time undertook in a variety of ways to provide for the welfare of the enlisted men. Section 12 of the Selective Service Act authorized the President to make regulations governing "the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army," and it was made unlawful to sell any intoxicating liquor to any officer or member of the mili-

¹ The administration of the act by means of local and district boards is discussed in a subsequent chapter. Below, p. 211-213.

tary forces while in uniform. In pursuance of the authority conferred upon the President the Secretary of War established "a zone five miles wide" within which alcoholic liquors might not be sold or given by one person to another, cities and towns within that area being partially exempted. Section 13 of the same act authorized the Secretary of War "to do everything by him deemed necessary" to suppress houses of ill-fame within such distance as he might deem needful of any military camp or place of mobilization; and it was made a criminal offense to receive any such person into any such house for immoral purposes or to permit such person to remain there. A subsequent and more stringent amendment to Section 13 went into further details and made the act itself of engaging in prostitution a criminal offense. Section 13 of the Selective Service Act was attacked as unconstitutional on the ground that it invaded the reserved rights of the States to provide for the health and morals of the community, and constituted an attempt on the part of Congress to exercise a "police power" not granted to it by the Constitution. But the court replied that the restrictions imposed by Congress were not imposed in the exercise of police power, but in the exercise of the war powers of Congress. The power to raise and support an army carries with it by implication the power to protect the morals of the soldiers composing the army. Moreover, the Secretary of War, in publishing the regulations, was not exercising legislative power, but merely giving effect to a law already complete when it left the hands of Congress.¹ The decision is of importance both as showing the extent to which the powers of local self-government reserved to the States by the Constitution had to yield to the right of Congress to protect the national forces, and as justifying the transfer of the penalties normally attending a violation of the terms of the law itself to a violation of the admin-

¹ *United States v. Casey*, 247 Federal Reporter, 362. The same ruling was later made by the Supreme Court in the case of *McKinley v. United States*, decided April 14, 1919.

istrative regulations applying the law at the discretion of the Executive.

Scope of the Civil Relief Act. In addition to legislation to protect the health and morals of the army, Congress passed after considerable delay the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, the object of which was to prevent prejudice or injury to the civil rights of persons in the military service of the United States. The law provided that before a judgment by default might be obtained the plaintiff should file in the court an affidavit showing that the defendant was not in military service. Where the defendant was in the military service the court was to appoint an attorney to represent the defendant and protect his interest, and might require as a condition before judgment was entered that the plaintiff file a bond to indemnify the defendant against any loss he might suffer should the judgment be later set aside. Provision was also made that no eviction or distress should take place in respect to premises rented for dwelling purposes by the wife, children, or other dependents of a person in military service, where the rent of the house did not exceed \$50 per month. Installment contracts were protected by requiring that where a person in military service failed to meet his successive obligations the right to rescind should not be exercised except after action in a court of competent jurisdiction. In like manner mortgages were protected against foreclosure except with the express approval of the court, and insurance policies were carried by the Government for the insured by the deposit of government bonds with the insurer to be held as security for the payment of defaulted premiums with interest after the discharge of the person from military service. The provisions of laws fixing the conditions of residence, improvements and assessments, in establishing claims to mining, homestead, and desert land entries on government lands were suspended during the war in favor of persons in military service. Many of these provisions were a serious encroachment upon the powers

of the separate States to regulate the legal relations of their citizens, and they would, of course, in normal times have been entirely beyond the jurisdiction of the Federal Government. Their constitutional justification lay in the elastic interpretation given to the brief clause, "to raise and support armies."

The War Risk Insurance Act. The important act by which Congress made provision both for the welfare of the families of men in military service, and for their own support in case of disabling wounds, did not involve the assumption of any new powers by Congress, and might therefore be excluded on that ground from our present consideration; but it marked such a radical departure from the policies pursued during and after the Civil War and must prove in time to have prevented such serious political abuses, that it may be briefly referred to in that connection. If the "bounty" system, by which the several States made it possible during the Civil War for men to enlist who had families dependent upon them, was both haphazard in its operation and, as we have seen, attended by numerous abuses, the pension system by which the Federal Government undertook to make provision after the war for the wounded and for the families of those who had been killed was responsible for political evils of the most serious kind. The worst of these arose in connection with private pension bills, by means of which representatives log-rolled through Congress grants of pensions to their constituents who in many cases had been justly refused pensions by the administration bureau under the general law. An indication of the extent of the evil may be gathered from the fact that President Cleveland felt called upon to veto as many as 233 such private bills. It is well known that the pension list as it stands to-day includes many persons who suffered no physical impairment in consequence of their period of service and who are in no need of financial help from the Government.

Provisions for allotments, allowances, and compensation. Conscious of the abuses attending the existing pension system, and realizing that the magnitude of the new armies about

to be raised and the democratic basis upon which they were being recruited called for a more logical and at the same time a more equitable plan of relief, Congress enacted a comprehensive law including both maintenance for the families of the men in service and provision for the men themselves if wounded, or for their families in the event of their death. The War Risk Insurance Act of October 6, 1917, in the form of an amendment to earlier acts covering marine insurance, is in reality one of the most striking developments of social legislation produced by the war. In the first place the law recognized the obligation of the enlisted man to contribute in fair measure to the support of his wife and children, and insisted that he was not to be allowed to evade the obligation merely because he was in military service. The Government, therefore, withheld a certain portion of the pay of the enlisted man under the form of a "compulsory allotment" to wife and children, and it then met this allotment by a corresponding "allowance" varying in amount according to the number of children. In the case of dependents other than wife and children the man had to prove that he had contributed to their support before he entered the service, and had to be ready to make a "voluntary allotment" before the Government was willing to make the fixed "allowance" for such cases.¹ In the second place the law made automatic "compensation" in case of death or disability resulting from injury suffered or disease contracted in the line of duty. This part of the law takes the place of the old pension system, but with the marked improvement that the compensation is determined in advance and there is no room for special pension legislation, except possibly

¹ The allowance of the Government amounted to \$15 in the case of a wife, \$25 in the case of a wife and one child, and so on up to \$50; to which must be added the corresponding compulsory allotment of \$15 or more. The amounts, were, of course, not adequate to meet all cases, but in view of the heavy burden laid upon the average tax payer Congress felt that a minimum sum had to be fixed, and left it to State and other organized agencies of relief to provide for special cases.

in the case of officers who were not adequately provided for. Moreover, the amount of the compensation varies in accordance with the size of the man's family, and is automatically increased in the case of a disabled man who marries and has children, thus making it unnecessary for him to appeal to Congress for special aid.

Insurance features of the law. But the most novel feature of the law, and the one of most constructive importance for the future, is that which enabled the enlisted man to insure himself against death or permanent disability, and thus obtain an additional income for his family over and above the fixed compensation granted by the Government. The idea underlying the provision for insurance was that Congress recognized the disadvantage in which the enlisted man was placed should he desire to obtain insurance from one of the standard companies, whose rates for men in the army were practically prohibitive. Insurance was therefore furnished by the War Risk Bureau at cost, disregarding the extra-hazardous risks and making no charge for the expenses of administration or for profits. Provision was also made that after the war the insured might convert his war policy into one or other of the ordinary forms of life insurance, with the Government continuing in the position of insurer. We thus find the Government, now that the war is over, ready to exercise a standing business relationship with as many of the four millions of men as choose to avail themselves of the opportunity of obtaining permanent life insurance without medical examination and at lower cost than such insurance could be obtained elsewhere. The results of the experiment will be watched with much concern by all those interested in the various forms of social insurance by which it is proposed that the Government shall offer protection against sickness, accident, old age, and unemployment. Whether in this extension of government functions the Federal Government shall encroach further upon the separate state governments is a question yet to be determined; but as things stand at present in respect to the legislative fields as-

signed to the central and the local governments, the Federal Government must limit its activities to the extension of insurance to the civilian employees of the Government, leaving it to the state governments to further the progress of social insurance for the public at large. Social insurance will undoubtedly form one of the important problems of constructive legislation in the future, and there is no doubt but that a great impulse has been given to it by the action of Congress in passing the War Risk Act. Whether it is wise in normal peace times to confer upon the Government such extensive functions is, however, a doubtful question in the minds of many publicists.¹

Mobilization of material resources. Second only in importance to the problem of raising the new armies provided for by the Selective Service Act was the problem of stimulating the production of munitions, food, and fuel; of directing the transportation system of the country so as to facilitate the production and proper distribution of commodities; and of regulating the consumption of raw materials so as to conserve those needed to meet the special demands of the army and of war industries. In each of these three fields Congress assumed new powers denied to it by the Constitution in normal times of peace but implied in time of war in the power "to raise and support armies." A thorough study of all the legislation adopted by Congress and of the administrative agencies created by the Executive to regulate production, distribution, and consumption in the interest of strengthening the fighting arm of the nation

¹ The hope that so comprehensive and constructive a measure as the War Risk Insurance Act would remove the question of remuneration for services in war from the arena of partisan politics has already been defeated in the passage by the House of Representatives of a "bonus bill," the obvious purpose of which, in the form in which it was first introduced, was to win votes in the coming election. In the face of public criticism and of the inability of Congress to find a way of raising the large sums necessary to provide the "bonus," the bill failed of passage by the Senate before the adjournment of Congress on June 5, 1920.

would lead us into a general history of all the activities of the war. Our interest here is chiefly in those special laws and their administration which mark the extension of the control of the Federal Government over the life of the country and contain in themselves the seeds of a new development of the functions of government in time of peace. We entered the war with a Federal Government of limited powers; we fought the war with a Federal Government of almost unlimited powers; now that the war is over shall these new functions of the Federal Government be entirely abandoned as belonging only to the urgency of war, or shall they be continued in modified form in so far as the Constitution permits, and the Constitution amended where necessary?

The production of munitions. The problem of mobilizing the industrial resources of the country so as to stimulate the production of munitions of war had been partly met before the declaration of war in the creation by Congress in 1916 of the Council of National Defense. Among the sub-committees appointed by the Council were the Munitions Standards Board, whose duty it was to cooperate with the War and Navy Departments in determining and adopting standards for the manufacture of munitions of war, and the General Munitions Board, whose duty it was to coordinate the buying of munitions by the Army and Navy Departments and to assist in obtaining the raw materials and the manufacturing facilities necessary for the production of munitions. These two committees and other lesser ones were subsequently merged into a new War Industries Board, which acted as a centralizing agency for the satisfaction of the demands of the several branches of the War Department, and undertook to reorganize the industrial resources of the country so as to insure that the requirements of the Government would be met as speedily as possible. Acting in pursuance of general powers conferred upon the President by the National Defense Act of June 3, 1916, the committee assumed several quasi-legislative functions, among them being the determination of priorities in respect to the production, de-

livery, and use of materials and supplies, the fixing of prices where it was found necessary, and the requiring that wasteful methods of production should be eliminated in favor of more scientific and economical plans prescribed by the committee.¹

Control over shipbuilding. The building of ships, like the production of munitions, was considerably facilitated by action taken prior to the war. On September 7, 1916, Congress passed the Shipping Board Act, the principal object of which was to encourage, develop, and create a naval auxiliary and a merchant marine to meet the requirements of the commerce of the United States. The Board was given powers approximating those exercised by the Interstate Commerce Commission and the Federal Trade Commission over inland transportation, and it was further empowered to have vessels constructed in American shipyards and elsewhere, and to purchase, lease and charter vessels suitable, in so far as commercial requirements might permit, for use as naval auxiliaries in time of war. On the outbreak of the war the Board organized, under the laws of the District of Columbia, a private corporation with a capital stock of \$50,000,000, under the name of the United States Shipping Board Emergency Fleet Corporation, the stock of which was subscribed for by the Board, and to which the Board delegated its powers in respect to the acquisition and operation of vessels. A subsequent act of June 15, 1917, authorized the President not only to take over any ships under construction, but also "to require the owner or occupier of any plant in which ships are built or produced to place at the dis-

¹ An excellent description of the work of the War Industries Board may be found in an article on "War Organization," by W. F. Willoughby, in the "American Year Book for 1918," and a fuller treatment in the same writer's "Government Organization in War Time and After," which has been freely drawn upon in these paragraphs.

Mention should also be made, in connection with the production of munitions, of the activities of the War Finance Corporation, created by act of April 5, 1918, the purpose of which was to advance funds to essential industries which might be unable to secure the money needed at reasonable rates.

posal of the United States the whole or any part of the output of such plant," and "to requisition and take over for use or operation by the United States any plant, or any part thereof, without taking possession of the entire plant." The entire shipbuilding resources of the country were thus brought under the practical control of the Government. By a still later act of July 18, 1918, the President was authorized to operate the ships and shipping agencies almost as completely as the railroads and the telegraph and telephone systems were operated under direct government control. Ships already in service were requisitioned and in many cases operated by their owners under charter from the Emergency Fleet Corporation; while in other cases the ships were operated by the Corporation itself through a special operating department, and free training and engineering schools were established to recruit merchant marine officers.

Control over food products and fuel supplies. If the control exercised by the various administrative boards over the production of munitions and the building of ships brought a large part of the industrial life of the country into direct relations with the central government, the extension of the powers of Congress and of the President over the food and fuel supplies of the country brought each and every citizen into close touch with the federal agencies established to regulate the production and distribution of those commodities. The problem of the food supply was one which bore upon the Government chiefly in the interest of meeting the needs of our Allies; but it had direct reactions upon our own people at large in consequence of the fact that the excessive demand from abroad tended to enhance prices and to increase opportunities for profiteering by unscrupulous dealers. To meet the problem Congress passed the Food Production or "Food Survey" Act, approved August 10, 1917, which enlarged the powers of the Department of Agriculture in the interest of increasing food production through the distribution of seeds, and of eliminating waste through the prevention and eradication of plant

and live stock diseases. On the same day the Food and Fuel Control Act was approved, which provided for the establishment of a rigid governmental control over the production and distribution of foods, fuels, fertilizers, and tools and machinery required for the production of foods and fuels. At the same time it imposed penalties upon all who should attempt to hoard any of the above "necessaries," or to restrict the supply and distribution of them. The President was authorized to fix the price of wheat, the object being to insure on the one hand that farmers should not fear that an unusually large crop would result in low prices and on the other hand that the unusual demand should not unduly raise the price. The political implications of this attempt to regulate the marketing of this vital element among the necessities of life were interesting as showing the pressure brought to bear by the agricultural representation in Congress to have the price fixed when it was thought that such action was needed for the farmer's protection, and the opposition to price fixing by the same group on a later occasion when it appeared that the price would advance beyond that determined upon by the Government.

Prohibition legislation under guise of food conservation.

A further political feature of the act was the presence of a rider prohibiting the use of foods, fruits, or food materials in the production of distilled spirits for beverage purposes. The prohibition was absolute and allowed the President no discretion as to whether there was need for such a restriction. At the same time an entirely irrelevant provision was introduced forbidding the importation into the United States of any distilled liquors. In the case of food materials used in the production of beers and wines, the President was authorized to apply restrictions according to the need for conservation. The authority thus granted was not exercised by the President, since it did not appear to the Food Administrator that the shortage of food was so great as to call for the restriction. More drastic legislation against intoxicating liquors was contained in a rider to the Food Stimulation Act (Emergency Agricultural

Appropriation Act) of November 21, 1918, which extended the prohibition of the use of foodstuffs to the production of beer, wine, or other intoxicating malt or vinous liquors after May 1, 1919, and until the end of demobilization. At the same time the sale of such liquors was prohibited after June 30, 1919, until the end of demobilization. The striking feature of this prohibition rider, known separately as the War-time Prohibition Act, is the fact that it was passed ten days after the armistice had been signed, when the cessation of the losses due to submarine warfare and the probability that relief would come to Europe before the law would come into effect made the necessity of the legislation as a food conservation measure much less apparent. Moreover, there was no connection between the prohibition of the sale of intoxicating liquors and the stimulation of food production, since the manufacture of such liquors had already been forbidden by the Food and Fuel Control Act, and such sales as might take place could only be from stocks on hand. The evidence all pointed to the determination of the forces in Congress favoring prohibition to make use of every opportunity to secure temporary legislation pending the adoption of the amendment to the Federal Constitution then awaiting ratification by the States. To have based the prohibition rider squarely upon the need of conserving the industrial manpower of the nation, and to have attempted to pass it as a distinct measure to be judged on its own merits, would doubtless under the circumstances have been to invite defeat.

Constitutionality of the War-time Prohibition Act. The constitutionality of the War-time Prohibition Act was contested upon several grounds, and a decision was handed down by the Supreme Court of the United States on November 15, 1919, which incidentally discussed a number of important questions relating to the war powers of Congress.¹ In the first place the court disregarded the lack of connection between the prohibition rider and the conservation of food, and accepted

¹ *Hamilton v. Kentucky Distilleries and Warehouse Company*, decided December 15, 1919.

without questioning a justification of the act based upon the general ground that it tended to guard and promote the efficiency of army and navy and of the workers engaged in the manufacture of munitions and supplies. At the same time the principle was reaffirmed that the court may not "pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence." In the second place the court found no violation of the "due process of law" clause of the 5th Amendment in the failure of the government to make compensation for the losses resulting from the restrictions imposed, since these losses were not the result of a direct appropriation of private property for public purposes, but were incidental to the exercise of a valid constitutional power.

But the most important question raised by the case relates to the extension of the war powers of Congress into the post-war period. On the one hand it was contended that at the time the suit was brought it was evident that hostilities would not be resumed, that demobilization had been effected, and that the war emergency was thereby removed, and the law was in consequence void. In proof of this, statements of the President were adduced to the effect that the war had ended (address to Congress, November 11, 1918) and peace had come (Thanksgiving Proclamation, November 18, 1918); and it was shown that many war-time activities had been suspended, and that trade with Germany had been resumed. But as against these allegations the court pointed out that Congress had on October 28, 1919, made further provision for the administration of the very law in question, and had thus treated the war as continuing and demobilization as incomplete. Moreover, the Senate had but recently refused to ratify the treaty of peace with Germany, the provisions of the Lever Act were still being enforced in respect to the control of the fuel supply, the railroads were still being operated by the President, and modified control over food supplies was still in effect. In conclusion, the court, while "assuming that the implied power

to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it," nevertheless refused to consider that the power based upon this emergency was limited to the period of actual fighting. "It carries with it," said the court, quoting from a Civil War case, "inherently the power to guard against the renewal of the conflict and to remedy the evils which have arisen from its rise and progress."

Constitutionality of the Volstead Act. The final stage in the enactment of prohibition legislation in pursuance of the war powers of Congress was reached in the Volstead or National Prohibition Act, which was passed over the President's veto, on October 28, 1919. This measure, besides making provision for the enforcement of the 18th Amendment which had been ratified since the passage of the War-time Prohibition Act, interpreted the words "beer, wine or other intoxicating malt or vinous liquors" in the earlier act as meaning any such beverages which contained one-half of one per centum or more of alcohol by volume. The constitutionality of the law was immediately contested upon grounds similar to those raised in the case of the War-time Prohibition Act. But the Supreme Court overruled the objections taken and upheld the law on the ground that the implied war power of Congress over intoxicating liquors extended to the enactment of a law which would effectively prevent their sale, even though the standard of alcoholic content fixed by the law was below what was actually intoxicating.¹

Activities of the Food Administration. In pursuance of

¹ *Ruppert v. Caffey*, decided January 5, 1920. The constitutionality of the Volstead Act as an exercise of the power of Congress to enforce the provisions of the 18th Amendment was upheld in a later decision, handed down on June 7, 1920. See below, p. 265. The difficulties which the War-time Prohibition Act and the National Prohibition Act created for the administrative departments of the several States will be referred to in the following chapter.

the powers granted him by the Food and Fuel Control Act the President appointed a separate administrative body, known as the United States Food Administration, to carry out the provisions of the act. The activities of this body are familiar to all, and our only interest here is noting the political significance of the methods followed by it. As far as possible the Food Administration attempted to attain its objects by securing the voluntary cooperation of the public and of business interests involved. An appeal was made to all to become "members" of the Food Administration, and thus to obligate themselves to follow the rules laid down by the Food Administrator for the purpose of conserving supplies. But no attempt was made, as in Great Britain, to make the wasting of food a criminal offense or to put the people upon fixed rations. A degree of pressure was subsequently brought to bear upon the public in indirect ways; and efforts were made to prevent profiteering by a system of licencing dealers and penalizing them by the withdrawal of their licences in case they failed to observe the regulations of the Food Administration. The Administration had no power to fix prices except in the case of wheat, but "fair price lists" were posted by local boards, which tended at least to prevent discrimination and excessive over-charging.¹

Advantages of voluntary agencies. Can it be said that the voluntary system was more of a success in the United States than in Great Britain where it was tried and in part abandoned after it had proved ineffective? It would be difficult to make a fair comparison under such dissimilar circumstances. But while it can be said that surprisingly good results were obtained from the voluntary system in the United States, there is little doubt but that much waste continued in spite of it.² Had there ever been such shortage of food in the United States as in Great Britain it is certain that a ration-

¹ Further details of the activities of the Food Administration may be found in Lippincott, "Problems of Reconstruction," Chap. II.

² The requirement that an equal quantity of the more abundant foods should be bought for each pound of wheat flour and sugar was generally admitted to have led directly to wastage.

ing system would have been demanded. But under the conditions with which the United States was faced, the voluntary system not only accomplished its purpose but proved to be a most valuable lesson in community cooperation and practical democracy. A people unaccustomed to governmental regulation of their domestic habits responded to the appeal with far less reluctance than would probably have been the case had compulsion been put upon them. One of the great problems facing democracy in the future is the increasing necessity of regulating a wide variety of the activities of daily life which have hitherto been left to individual initiative. How this can be accomplished without at the same time bringing law itself into disrepute by the very multiplicity of its provisions and the impossibility of securing their enforcement is a difficulty which may prove insuperable unless resort be had to methods of control similar to those adopted by the Food Administration. Compulsory agencies may prove more effective in time of war when immediate results must be obtained and when the imperative demands of national safety make it necessary to disregard the question of moral gain or loss; but as between compulsory and voluntary agencies as a permanent system there can be but little hesitation in choosing the latter wherever they offer a fair promise that the minimum needs of the situation will be met.

Activities of the Fuel Administration. The powers granted to the United States Fuel Administration, created by the President under the authority of the Food and Fuel Control Act, were similar to those granted to the Food Administration. The same policy of combining compulsory orders with an appeal to voluntary cooperation was likewise resorted to. Appeals were made both to the operators and to the mine workers to increase their output; prices of coal were fixed for each stage of its handling from mine to consumer; restrictions were placed upon the use of coal for less necessary purposes, such as the illumination of sign-boards and shop-windows; trans-

portation was regulated so as to avoid unnecessary cross-hauls; and as a last emergency all factories east of the Mississippi not engaged in war work were closed on Mondays for a period of two months. Restrictions were likewise placed upon the use of fuel oil and of gasoline, and the public was called upon to impose upon itself a self-denying ordinance prohibiting the use of automobiles on Sunday. Those who are inclined to be sceptical of the force of public opinion to secure the observance of rules to which no penalty is attached may study with profit the records of the Sundays of the fall of 1917. At the same time it cannot be denied that hardship and inequality attached to a rule which permitted the use of gasoline without restriction for purposes of pleasure on week-days and prohibited even its limited use on Sunday for the same purpose. In normal times it would be necessary to frame a more logical rule.¹

Government operation of the railways. The most striking extension of the functions of the Federal Government during the war was exhibited in connection with the assumption of control over the railway system. Upon the outbreak of war steps were immediately taken to place the entire facilities and personnel of the railroads of the country at the disposal of the Government; and at the same time it was recognized as imperative that the separate railway systems would have to be coordinated and operated as a unit if the most effective service was to be obtained. An attempt was made at first to secure this unity of operation through the action of the several companies themselves, and a committee known as the "Railroads' War Board" was appointed by the American Railway Association to secure the desired cooperation. The failure of this committee to furnish the service required of the railroads was not due to faults of management on its part, but to the inherent weakness of the financial basis upon which the separate units of the system had been built up. Money was needed to meet the demand for increased wages and the more pressing need

¹ For further details, see Lippincott, *op. cit.*, Chap. III.

of maintenance and repair; and in the absence of a response from the investment market it became necessary for the Government either to permit sharp advances in freight rates and to make loans to the railroads or else itself to take over the administration of the railways during the war. The latter alternative was adopted, and on December 26, 1917, the President announced that, in pursuance of authority from Congress granted in an army appropriation act of 1916, the Government would assume control of the railroads of the country and of the system of water transportation.

The bargain between the Government and the railways. The conditions under which the railways were to be operated by the Government were laid down in the act of March 21, 1918, entitled, "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes." Certain features of the act which are of special political significance as bearing upon the problem of the relinquishment of government control after the war may be briefly mentioned. With respect to the protection of railway investments, the President had promised at the time of taking over the roads that investors in railway securities might rest assured that their interests would be looked after by the Government as scrupulously as by the directors of the railway systems themselves. In fulfillment of this promise the act of Congress made provision that every line taken over should be guaranteed an income equal to the average annual operating income earned during the three years preceding June 30, 1917. At the same time provision was made for maintenance, repair, renewals, and depreciation, with the object of enabling the Government to return to each railroad its property in "substantially as good repair and in substantially as complete equipment as it was at the beginning of federal control." A Revolving Fund was created by a first appropriation of \$500,000,000, in order to pay the expenses of federal control and at the same time to insure proper compensation to the railways and to make ad-

vances to them for extensions, betterments, and new equipment, additional compensation being allowed to the railroads for such capital expenditures and provision being made for reimbursing the Government for such additions and betterments as were not properly chargeable to it.¹ With respect to the period of federal control, the act provided that the railroads were to be returned to their owners not later than twenty-one months after the ratification of the treaty of peace; but the President was empowered to relinquish control at any time that he might deem such action needful or desirable. Efforts of the Director General to have Congress grant an extension of federal control for a period of five years after the war, within which time the value of government control might be tested, were unavailing. In December 1919, the President, without waiting for the time limit to elapse, announced that the railroads would be returned to their owners on March 1, 1920.²

Government operation of telegraph and telephone lines. The assumption by the Federal Government of control over the telegraph, telephone, and cable systems of the country was due not to the need of obtaining centralized operation, as in the case of the railways, but to the necessity of guarding more carefully the secrecy of communications, and particularly to the necessity of anticipating threatened labor troubles and thus securing the uninterrupted service required for the administration of war activities. Following the refusal to the Western Union Telegraph Company to submit to a decision of the National War Labor Board in a dispute arising out of the right of the employees to organize as a union, Congress adopted on July 5, 1918, a resolution authorizing the President to take over the several systems and operate them "during the continuance of the present war," subject to the same conditions of

¹ The difficulties which these provisions gave rise to and the obstacles which they presented to the return of the railroads to their owners will be considered in a subsequent chapter.

² The various proposed solutions for the reorganization of the railway systems will be discussed in a later chapter in connection with the general program of economic reconstruction.

law in force in regard to the steam railroads while under federal control. Considerable opposition to the resolution was offered by congressmen who held that no good reason had been given for the assumption of control by the Government, and who suspected that the desire of the administration to take over the lines was due to an intention to make such action the first step towards ultimate government ownership and operation. The telegraph and telephone lines were taken over by the Government on August 1, 1918; but action was delayed in the matter of the marine cable systems until a proclamation of November 2, taking effect November 16, when the armistice had been signed and the war was practically at an end. The reason assigned by the Postmaster-General was the urgent need of the Government to control the lines "during the period of readjustment." After an administration of the three systems by the Postmaster-General which gave general dissatisfaction both in regard to service and in regard to the adjustment of labor difficulties, the lines were returned to their owners on August 1, 1919. Many former advocates of government ownership were frank in expressing a change of views as to its desirability in consequence of the experience of temporary government control.

War industries and the problem of labor. Interwoven with the problem of government control over essential war industries and over the means of transportation and communication, and in some cases dictating the assumption of control by the Government, was the question of mobilizing the labor forces of the country. We have seen how the problem of supplying the man power necessary to constitute an effective force was met by abandoning the system of voluntary enlistment in favor of general conscription within fixed age limits. Why was not the same compulsory system adopted in the case of the workers in munition factories and other essential industries? Compulsion was applied, where necessary, to the owners of factories, of shipyards, of mines, of the railways, telegraphs, and telephones, and other industrial establishments

and agencies. Why should it not have been applied to the employees as well, by constituting them as it were an industrial army sworn to render the full measure of service required of men drafted into the fighting forces? The question may be debated as a theoretical proposition, but as a practical matter it was found more expedient by the Government to have recourse to voluntary methods of control. In so doing it cannot be said that the Government met with a full measure of success. But the difficulties encountered were of a character to which hard and fast solutions could not be applied; and in many instances the Government was but paying the price of the inherent weakness of a labor system in which the conditions of living and the wages paid were based not upon abstract standards of justice, but upon the law of supply and demand.

Government agencies for the settlement of disputes. The principal difficulty arose in connection with disputes between employers and employees with regard to the scale of wages. Further difficulties arose in connection with living conditions among the workers engaged in mushroom war industries; and here the Government endeavored to meet the causes of discontent by determining standard conditions of labor and seeking to secure their adoption by the employers, and in some cases by assisting the employers with elaborate plans for housing and other accommodations. At the outbreak of the war the Government found itself in the possession of two distinct agencies for the adjustment of labor difficulties. The Newlands Act of 1913 had provided a Board of Mediation and Conciliation which was to exercise the functions indicated by its name in disputes between interstate commerce carriers and their employees. No binding character attached to the awards of the Board; but it had been successful in a large number of cases in the settlement of labor disputes in connection with the railways. Secondly, there was the Division of Conciliation of the Department of Labor, established by the Secretary of Labor under the general powers conferred upon the Depart-

ment when created in 1913. This body also could only offer its services to the disputants, and had no power to compel a hearing or to render binding awards. In addition to these bodies the Advisory Committee of the Council of National Defense had formed a Committee on Labor, of which Mr. Gompers, president of the American Federation of Labor, was a member. After obtaining the support of the representatives of organized labor, Mr. Gompers called a conference of employers, labor leaders, and other public men, which was then organized as the full Committee on Labor of the Council of National Defense. This committee appointed an executive committee of eleven members to act for it; and it was upon the appeal of this executive committee, speaking through the Council of National Defense, that a "truce" was entered into between capital and labor. This truce marked the basic relations between the two bodies during the period of the war. The chief conditions of this truce were that "neither employers nor employees shall endeavor to take advantage of the country's necessities to change existing standards," and that neither strikes nor lockouts should take place without resort being first had to the established agencies of the Federal and State Governments for the settlement of disputes.

The President's Mediation Commission. Further steps, however, were found necessary to meet particular emergencies. Radical leaders among the workers in a number of industries in the West took advantage of the crisis of the war to spread the doctrines of the I. W. W., and to increase discontent with existing political institutions by contrasting the normal indifference of the Government to the needs of labor with the new appeal now that labor was vital to the safety of the country. To offset this propaganda the President appointed a commission, known as the President's Mediation Commission, to investigate the causes of discontent among the radical elements; with the result that not only were a number of important disputes satisfactorily adjusted but steps were taken to put the relations between labor and capital on a new and more stable basis.

A valuable report was presented by the committee, in which the causes of industrial discontent were analyzed and recommendations were made for their correction.

The Government as an employer of labor. Again, it was found possible for the Government to make good in part its inability to fix by legislation general standards of labor, by imposing such standards upon contractors engaged in furnishing army clothing. The scope of this control over manufactures was not, of course, either extensive or permanent, but the action taken is of interest as showing how the Government in its capacity as employer may exercise an indirect control over a limited number of industries, and may set standards to which other industries will be gradually led to conform. For many years there have been laws fixing the conditions of labor in private industries furnishing the Government with supplies; hours of labor fixed by the Government have been imposed upon contractors engaged in work for the Government; and in certain instances wage standards have been imposed. When we add to this the example which the Government has set in the workshops, arsenals, and navy yards under its direct control, it will be seen that the influence of the Federal Government as an employer among other employers has been of no little value in improving industrial standards. The same is true of many of the separate state governments in their capacity as employers of labor; although in their case they have always possessed the authority, had they believed it proper to exercise it, to impose those standards upon private manufacturers.

Boards to adjust disputes and to determine policies. In January, 1918, an effort was made to unify the various agencies dealing with war labor by the creation of a central labor administration with the Secretary of Labor as Labor Administrator. An Advisory Council was then appointed to assist the Secretary in fixing standards and determining policies. In addition a larger War Labor Conference Board was created, consisting of representatives of both employers and employees. The program drawn up by this body was adopted by the Gov-

ernment and applied to the settlement of labor problems during the rest of the war.¹ Among other things the program recommended the appointment of a National War Labor Board, similar in membership to the War Labor Conference Board, the purpose of which was to carry out the policy advocated for the adjustment of labor disputes. The Board, acting under the joint chairmanship of ex-President Taft and Frank P. Walsh, was successful in settling a number of labor disputes. Its functions did not, however, extend to the determination of policies; and this need was later met by the creation of a War Labor Policies Board, representative of all branches of the Government service that were large employers of labor. This body undertook to determine standard conditions of employment which should be observed both by government agencies and in the war industries of the country; but before its elaborate program for the standardization of wages and hours of labor could be worked out in detail and put into general effect the war came to a close.² Lastly, mention must be made of the United States Employment Service, established under the Department of Labor for the purpose of recruiting war labor and directing it into the channels where it was most needed. Upon the recommendation of the War Labor Policies Board the President issued an appeal calling upon employers to have recourse to the Employment Service in recruiting unskilled labor, and upon employees to answer the call of the Service for voluntary enlistment in essential industries. Here again, the war came to an end before the full effect of the methods introduced by the Employment Service could be tested in actual practice.

Absence of compulsion from control over labor. The measures adopted by the Government for the control of labor during the war were thus all lacking in the compulsory char-

¹ The text of the program may be found in W. F. Willoughby, "Government Organization in War Time and After," p. 227.

² The program announced by the Board may be found in W. F. Willoughby, *op. cit.*, p. 241, and in Official Bulletin, July 25, 1919.

acter of legislative enactments. In this instance the United States did not follow the example of Great Britain even to the extent of providing for the compulsory arbitration of disputes in war industries. In indirect ways, however, pressure was brought to bear both upon employers and upon employees. In the instance of a strike at Springfield, Mass., the refusal of the employers to abide by the decision of the War Labor Board was followed by the commandeering of their plant. In another instance employees who refused to abide by the Board's decision were threatened with being barred from employment in war industries in their community and with being refused deferred classification in the selective draft, with the result that they voted to return to work. It cannot be said, however, that the voluntary measures adopted by the Government were wholly successful, whether or not coercive measures would have been more so. Serious strikes took place in the shipbuilding yards, and it was only after considerable delay and disorganization in their work that the strikers yielded to the decision of the Adjustment Board. Considered as an abstract proposition, there is no reason, as has been said above, why compulsion should not be applied to workers in essential war industries as well as to the men in the army for whom the munitions are being made. The principle of compulsory arbitration presents in time of peace both constitutional and practical objections as applied to industries other than public service corporations and possibly those industries engaged in producing the necessities of life; but there would seem to be no logical ground for opposing its enforcement in time of war, although considerations of expediency may dictate resort to voluntary methods. No more striking lesson has been taught by the recent war than that the old distinction between combatant and non-combatant forces rested upon conditions utterly different from those of the present generation, in which mechanical contrivances, manufactured by non-combatant civilians, were in some respects more important than man-power. And if the distinction be invalid in international law, it is equally invalid

in domestic constitutional law. In defining the "militia" as consisting of "every able-bodied citizen" between the ages of eighteen and forty-five, the laws of Congress already point the way to an extension of the conception of national duty in time of war.

Legislation to prevent interference with the conduct of the war. We may now pass from the survey of the laws of a positive character passed by Congress to meet the exigencies of the war, and of the extensions of executive power based upon those and other existing laws, to a consideration of the prohibitory laws passed with the object of preventing interference with the conduct of the war. It was pointed out above¹ that it is sounder constitutional law to justify the extensive powers assumed by Congress during the course of the war upon the clause of the Constitution giving Congress the power "to raise and support armies" rather than upon any implied powers possessed by Congress as the legislature of a sovereign state. This construction leaves the other clauses of the Constitution intact except where they must be subordinated to the power "to raise and support armies." In consequence, while conceding to the Government the fullest power necessary to bring all the forces of the nation to bear upon the defeat of the enemy, it may be held that this power had to be exercised with consideration for those other provisions of the Constitution which place restraints upon the acts of the Government in the interest of protecting the rights of the individual citizen. The "war powers" have, indeed, a position of precedence over other clauses of the Constitution, but the latter are still in force except in so far as they have been called upon to yield to the emergency.

The Espionage Act. The most important of the prohibitory laws passed by Congress were the Espionage Act of June 15, 1917, and its supplement, the Sedition Act of May 16, 1918. No measures passed by Congress to meet the needs of the war were the occasion of sharper differences of opinion

¹ P. 119.

at the time of their passage or met with more opposition subsequently than these; and at present writing agitation is still being carried on for the purpose of securing the release of persons imprisoned for acts in violation of their provisions. The features of the two acts which were the chief object of attack were those which placed restrictions upon freedom of speech and of the press and indirectly upon the right of public assembly, and those which granted authority to the Postmaster General to deny the use of the mails to objectionable publications. The issues involved in these provisions are obviously of vital importance to the future of democratic government, and it will be seen that many of the attacks made upon the restrictive features of the two acts were and are still directed not so much against the alleged necessity of such measures of protection in time of war, as against the introduction of a principle of government control which might serve as a dangerous precedent in the future times of peace. Students of American history will recall the bitter contest evoked by the passage of the Sedition Act of 1798, when the party in power endeavored to protect itself against criticism by a law providing a fine and imprisonment for the act of "combining" to oppose measures of the Government, and for "any false, scandalous, or malicious writing" against the Government or against its high officials with the intent "to bring them into disrepute." At the present day, now that the special needs of the war have been met, the issue is not that of one political party attempting to suppress another, but that of the conservative elements of both the leading parties attempting to put a check upon radical agitators who are seeking to bring about a fundamental change in existing political institutions.

Restrictions upon freedom of speech and of the press. Omitting for the moment those features of the Espionage Act which do not bear upon restrictions upon freedom of speech or of the press, title I, section 3 of the act made it a penal offense to "wilfully make or convey false statements with intent to interfere with the operations or success of the United

States or to promote the success of its enemies," or to "wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States," or to "wilfully obstruct the recruiting or enlistment service of the United States." Title VIII of the act forbids the "disturbance" of the foreign relations of the United States by false statements, misrepresentation, and conspiracy to injure or destroy specific property situated in a foreign country with which the United States is at peace. Title XII prohibits the use of the mails to all publications (including letters) violating any of the provisions of the act, as well as to all publications containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States. During the passage of the act an effort was made, at the request of the Administration, to have it include a press censorship clause punishing persons who, in violation of regulations prescribed by the President, should publish information relative to the public defense calculated to be of use to the enemy. But the proposed provision met with such opposition both in Congress and from the press itself that in spite of the statement of the President that the censorship provision was "absolutely necessary to the public safety" it was finally eliminated from the bill. A very limited form of censorship was, however, adopted in the provisions above mentioned making publications of a certain character non-mailable. At the same time a sort of voluntary censorship was adopted by the press, by which news of a kind that would be of obvious value to the enemy was excluded, and news of a doubtful character was submitted to the Committee on Public Information before publication.

The Sedition Act. The amendment to the Espionage Act, approved May 16, 1918, known as the Sedition Act, met with even greater opposition both within and without Congress. It consisted in an extension of title I, section 3 of the original act so as to make it a penal offense to make false statements with intent to obstruct the sale of Liberty Bonds, and particu-

larly to "wilfully utter, print, write or publish any disloyal, scurrilous, or abusive language about the form of government of the United States," or about the national flag or the uniform of the army or navy, or language calculated to bring the form of government or flag or uniform of the army or navy of the United States into disrepute. Language or publications intended to encourage resistance to the United States or to promote the cause of its enemies or to bring about a curtailment of the production of materials necessary to the prosecution of the war is likewise penalized. During the progress of the act through Congress an amendment was urged providing that "nothing in this act shall be construed as limiting the liberty or impairing the right of any individual to publish or speak what is true, with good motives and for justifiable ends"; but it was pointed out by opponents that this would place too heavy a burden upon the prosecution, and that it would give every offender an opportunity to explain his views to the court in detail and justify himself by the plea of good motives. The constitutionality of the measure was also attacked, and one senator went so far as to say that the bill was designed to prevent a man "from expressing legitimate criticism concerning the present Government."

Constitutionality of the acts. The constitutional issue raised by the Espionage Act in its original and amended forms turns upon the guarantee of freedom of speech and of the press contained in the 1st Amendment to the Federal Constitution. Is the guarantee there given absolute or conditional? If absolute, no conditions of emergency could justify placing restrictions upon it. But this has never been the interpretation put by the courts upon freedom of speech. Just as under the laws of the separate States similar constitutional guarantees are enjoyed subject to the common law relating to slander and libel, so the guarantee of the Federal Constitution is subject even in time of peace to such restraints as are necessary to protect the rights of the community at large and such as are necessary to maintain the efficient administration of justice in the face

of statements in contempt of court.¹ And if in time of peace restraints may be imposed, much more so may they be imposed in time of war when the safety of the state is at stake. As the danger to the public from false and inflammatory statements becomes greater, the power of the court to restrict them becomes proportionately enlarged. In the first case before the Supreme Court of the United States arising out of a violation of the Espionage Act, Justice Holmes framed the issue as follows: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."² In a subsequent case the court again lays stress upon the conditions under which the statements in question were made, and while condemning the defendant on the record before the court it went so far as to say that "it may be that all this might be said

¹ In the case of *Toledo Newspaper Company v. United States* (247 U. S., 402) the court, in justifying the power of the courts to punish a newspaper for statements intended to provoke public resistance to an injunction, spoke as follows: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."

² *Schenck v. United States*, 249 U. S., 47. It is of interest in this case that the circular which the defendant was instrumental in distributing, while denouncing conscription in impassioned terms and vigorously urging opposition to the selective draft, confined itself in outward form to peaceful means of action, such as petition for the repeal of the act. The court, however, judged the circular by its natural effect to encourage direct resistance to the law.

or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war.”¹ A further case decided at the same time, and involving a prominent Socialist leader, held that it was no justification of a public speech, so expressed that its natural and intended effect was to obstruct the enlistment service, to assert that it dealt with the general theme of Socialism and was part of a general program to obstruct war and expressed a general and conscientious belief.²

Political justification of the Sedition Act. The scope of the Sedition Act was far wider than that of the original Espionage Act in respect to its restraints upon freedom of speech. It was one thing to prohibit statements intended to interfere with the success of the military or naval forces of the United States, or intended to cause insubordination or to obstruct the enlistment service of the United States, but a much more serious step to penalize “abusive language about the form of government of the United States.” At first sight it seemed to some persons as if the obnoxious Sedition Act of 1798 was again upon the books. But a fair examination of the clause just quoted will show that it was intended not to repress criticism of the administration in office, whether of the President or of any lesser official, with respect to the conduct of the war. Its object was rather to suppress attacks upon American governmental institutions as a whole, where the effects of such attacks might be to undermine the morale of the people at a time when it was of the utmost importance to present a united front to the enemy. The assumption of the law was that American political institutions, whatever the character of the existing administration, were in themselves sound and offered adequate means of reform in accordance with prescribed methods; so that to attack the American form of government was to undermine the foundations of the national

¹ *Frohwerk v. United States*, 249 U. S., 204.

² *Debs v. United States*, 249 U. S., 211.

life. In time of war when great sacrifices are being demanded and the fullest cooperation is essential to success, it is clear that an attack upon the political faith of the nation by a minority opposed to the policies adopted by the Government, whatever the alleged sincerity of its motives, cannot be passed over in silence without an injury to the people at large. When issues as vital as those involved in war are at stake, the public is in no mood to listen even to the honest advocates of fundamental changes in the machinery of the State, much less to those whose motives in denouncing the existing form of government are not above suspicion.¹

Broad scope of the Sedition Act. It cannot be denied, however, that the terms of the law were unnecessarily broad, and that they gave to the courts a power which could have been used in a most oppressive and arbitrary manner had not judicial traditions been present to restrain them. In the single case which has thus far been passed upon by the Supreme Court,² the facts sustaining the conviction were of such a

¹ It is interesting to compare the provisions of the Espionage and Sedition acts with the order of President Lincoln in pursuance of the act of 1863, under which the writ of habeas corpus was suspended with respect to an aider or abetter of the enemy, who was defined as "one who seeks to exalt the motives, character, and capacity of armed traitors — overrates the success of our adversaries or underrates our own — who seeks false causes of complaint against our Government or inflames party spirit among ourselves and gives to the enemy that moral support which is more valuable to them than regiments of soldiers or millions of dollars." The order is quoted by Senator Sutherland as to be "read with profit" by those who condemn the Sedition Act as unnecessarily drastic. "Constitutional Power and World Affairs," p. 104.

² *Abrams et al. v. United States*, decided November 10, 1919. The five defendants were of Russian birth and were indicted for conspiracy in publishing two leaflets, one attacking the hypocrisy of the President in sending troops to Russia against the Bolsheviki and classing the United States among the capitalistic nations which were the one enemy of the workers of the world, and the other urging workers in ammunition factories to refrain from producing bullets to murder their friends in Russia, and to reply to the "barbaric intervention" of the United States by a general strike.

character as to lead to a vigorous dissent on the part of Justice Holmes who had delivered the opinion of the court in the cases arising under the Espionage Act referred to above. The majority of the court, after reciting details of the circulars upon which the indictment was based, found that "the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country, for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe"; and they regarded the advocacy of a general strike as language used with intent to encourage resistance to the United States in the war. In his dissenting opinion Justice Holmes insisted that in order to warrant conviction there must be in every case a "present danger of immediate evil or an intent to bring it about" if Congress is to be warranted in setting a limit to the expression of opinion where private rights are not concerned; and he failed to find in the leaflets evidence of actual intent in the strict sense required by the nature of the law, the purpose of the defendants being rather to prevent intervention in Russia than to impede the prosecution of the war against Germany. In conclusion the Justice summed up what seemed to him to be the proper attitude of the Government towards restrictions upon freedom of speech even in the case of attacks directed against the Constitution itself. "When men have realized," he said, "that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Consitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death,

unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

Exclusion of obnoxious publications from the mails. A more controversial question arose in connection with the powers assumed by the Postmaster General in connection with title XII of the act declaring publications which violated any of the provisions of the act to be non-mailable. This provision of the law was interpreted by the Postmaster General as empowering him to declare what publications were actually in violation of the act, and he was thus enabled to exercise a form of censorship over the press. The most important case that arose under this section of the law was that of the *Masses Publishing Company v. Patten*,¹ which grew out of the decision of Postmaster Patten of New York City in excluding the August, 1917, issue of that publication from the mails. The final decision of the higher court confirmed the right of the Postmaster General to exclude from the mails matter declared by Congress to be non-mailable, and in so doing to use his judgment and discretion as to the character of the publication, his decision being regarded as conclusive by the courts unless it should appear to be clearly wrong. Circulation of a publication in the mails has been held on a number of occasions not to be part of the freedom of the press, and in this present instance the court pointed out that "it is at least arguable whether any constitutional government can be judicially compelled to assist in the dissemination of something that proclaims itself revolutionary." It has been freely asserted, however, that the decisions of the Postmaster General were in many instances highly arbitrary, and not based upon what "a reasonable man" would consider as a violation of the law, being particularly drastic in respect to statements reflecting unfavorably upon the allies of the United States.

Constitutionality of a press censorship. It was pointed out above that the attempt made at the time of the passage of the

¹ 246 Federal Reporter, 33.

original Espionage Act to establish a censorship of the press had to be abandoned. It is still a matter of controversy whether such a censorship would be constitutional. A distinction must here be made between a provision, such as the one before Congress, penalizing statements useful to the enemy made in violation of regulations issued by the President and the creation of a board of censors who should pass in advance upon what might or might not be published. No constitutional objection would seem to hold against the former restriction once it be admitted that the need of some such restraint actually existed. The traditional doctrine of the liberty of the press has been that it consisted in freedom from restraints imposed *previous* to publication, leaving it to the publisher subsequently to defend himself before the courts against the charge of having published slanderous or seditious matter. Nor does there seem to the present writer any constitutional objection even to the establishment of a board of censors who should prevent by anticipation the publication of injurious matter, again assuming the necessity of such action for the protection of the country. If freedom of speech can be made to yield to the demands of war, freedom of the press can equally be called upon to subordinate itself to the national exigency. Whether as a political issue the establishment of such a censorship would have been wise or expedient in the recent war is, of course, another question, and it is possible to answer it in the negative without denying the constitutional right of the state to meet the demands of self-preservation.¹

¹ On this general subject the following studies may be consulted: "Freedom of Speech and of the Press in War Time: the Espionage Act," by T. F. Carroll, in "Michigan Law Review," June, 1919; "Freedom of Speech in War Time," by Z. Chafee, Jr., in "Harvard Law Review," June, 1919.

The aftermath of the Espionage and Sedition acts has taken the form of a number of bills by which it is proposed that Congress restrict the advocacy of radical methods of changing the form of Government of the United States, whether by a general strike or by any other method not provided for by the Constitution.

The War Materials Destruction Act. Among other measures passed by Congress to prevent interference with the conduct of the war were the War Materials Destruction Act, approved April 20, 1918, and the Trading with the Enemy Act, approved October 6, 1917. The former, otherwise known as the Sabotage Act, is of interest because of the collateral question of conscripting labor which was raised during its passage. It penalizes the act of wilfully destroying war materials, or factories engaged in their production, or utilities, such as railroads and bridges, used in connection with them; also the act of wilfully making or causing to be made in a defective manner any war material or instruments used in the production of war material. When the original bill came before Congress an amendment was carried penalizing the act of conspiring to prevent the erection of war premises or the production of war material with intent to obstruct the United States in preparing for or in carrying on the war. This amendment was interpreted as an attempt to prevent strikes among the workers in war industries, and a second amendment was adopted to the effect that nothing in the act should be so construed as to prevent employees from agreeing to stop work for the *bona fide* purpose of securing better wages or conditions of employment. The second amendment met with such sharp opposition in the Senate that the report of the conference committee was rejected, and it was only after further delay that a suggestion of Mr. Gompers, that either both amendments should be retained or both eliminated, was adopted and the two houses reached a decision to eliminate them.

The Trading with the Enemy Act. The Trading with the Enemy Act was a pure war measure primarily designed to prohibit commercial intercourse with the enemy, but containing in addition provisions authorizing the President to provide a censorship of messages between the United States and any foreign country, to issue regulations with regard to the foreign-language press within the country to prevent its use to promote disloyalty, and to lay an embargo on imports from

any foreign country. A further important provision enabled the Government to take over all property situated in the United States belonging to an enemy or ally of the enemy. This last provision specifically created the office of Alien Property Custodian, who was empowered to seize and sequester property of the enemy as described in the act. The property taken over was not that of German citizens resident in the United States, but of persons residing in the enemy country, in order that not only should no profit be derived from such property to the advantage of the enemy, but that in cases where the property existed in the form of industrial enterprises, these latter should not be operated in a manner detrimental to the interests of the United States. It is a problem not within the scope of the present volume how far the activities of the Alien Property Custodian exceeded the rights of the United States under the customary rules of international law. That there was a marked departure from the practice of previous wars is clear; while the fact that the changed circumstances of the recent war demanded such a departure is but another comment upon the paradoxical character of the "laws of war."

The problem of the enemy alien. The declaration of war raised in an acute form the question of the status of unnaturalized persons of foreign birth who were present to the number of many millions in our population.¹ These aliens included both those born on the soil of the enemy country, or born of enemy parentage in countries other than the United States and Great Britain, and those born in countries other than those of the enemy and of other than enemy parentage. The former group were bound by a legal bond of allegiance to the enemy, and might in many or in most cases be regarded as in sympathy with the enemy as against the country of their residence. In addition to these unnaturalized enemy aliens were others of enemy birth or parentage who had become

¹ Figures compiled by the National Americanization Committee early in 1918 showed that there were in the United States thirteen million persons of foreign birth and thirty-three million of direct foreign parentage. "American Year Book, 1918," p. 797.

naturalized, but whose affections were still tied up with their mother country and who had never contemplated the practical possibility of having to choose between it and their adopted country. As a result of this situation the Federal Government found it necessary to take steps for the protection of the country against any overt acts which sympathizers with the enemy might be led to commit either upon their own initiative or at the instigation of secret agents of the enemy. Even before the entrance of the United States into the war the numerous explosions in ammunition factories and other outrages pointed to the existence of an organized campaign to obstruct the industries of the United States in so far as they might be engaged in the manufacture of war material to be sold to the allied powers.

Control over persons and property of enemy aliens. Authority had already been granted by Congress to the President before the declaration of war for the arrest and detention of alien enemies,¹ and it was only necessary for the Executive Department to determine upon the degree of restraint to be imposed upon them. Entrance into the country or departure from it was denied to them; zones and districts were fixed into which they were not permitted to enter; registration was required of them; their freedom of movement was in certain cases restricted to their places of residence and of business; and their freedom of speech limited by the provisions of the Espionage and Sedition Acts. An elaborate secret service was created by the Department of Justice under its Bureau of Investigation, the object of which was to keep in touch with enemy-alien activities and enable the government to take immediate action in cases where the restrictions imposed were being violated. Restrictions were placed upon the business activities of enemy aliens to the extent necessary to prevent assistance being given to the enemy by indirect or even negative means, as for example through the withholding from the use of the public of

¹ An amendment was adopted extending the provisions of the act to women as well as to men.

patented articles. Provision was made that patents and copyrights owned or controlled by the enemy should be open to use by citizens of the United States, and restrictions were placed upon the further granting of patents and copyrights to enemy aliens. Branches of insurance companies incorporated in the country of the enemy or of its allies were brought under supervision and were forbidden to write insurance after December 9, 1917, or to enter into reinsurance contracts after January 11, 1918; but no restriction was placed upon existing contracts, which were allowed to run until regular expiration.

Functions of the Alien Property Custodian. More drastic, however, than the restrictions upon the personal freedom and business affairs of resident enemy aliens were the measures taken by the Government to sequester and administer the property located in the United States of enemy citizens residing within the military lines of Germany and her allies or residing outside the United States and doing business inside those lines. The object of this section of the Trading with the Enemy Act was not to confiscate the property of the enemy, which was protected by the rules of international law, but to prevent the enemy from reaping any advantage from the possession by its citizens of property situated in the United States. The Alien Property Custodian was empowered to receive all money and property in the United States due or belonging to an enemy or ally of the enemy, and to hold and administer the same under the general direction of the President. Debts owing to persons in the country of the enemy or of its allies were to be paid over to the Alien Property Custodian and should be thereupon regarded as discharged. Mortgages might be enforced upon the property of the enemy and the proceeds of the sale in excess of the obligation were to be transferred to the care of the same official. The administrative machinery created by the Alien Property Custodian for the performance of the above duties was elaborate, consisting partly of an official force of investigators and partly of the volunteer assistants placed at his service by the heads of the banks, trust com-

panies, and corporations whose books had to be examined. In some cases the property thus discovered and taken possession of was administered by the Custodian as trustee for the owners, but in most cases it became necessary to sell the property or business as a going concern and hold the funds in trust for the owners. In the latter case provision was made that the property should be sold only to American citizens, who were obligated not to resell such property to persons not citizens of the United States. Undoubtedly the action thus taken by the United States was, as has been said above, in excess of the prescriptions of international law in respect to the property of enemy citizens, and its justification must be sought in the changed conditions of modern finance which, by means of a complex system of international exchange, permits the transfer of funds in ways that easily evade detection. A further justification was offered by the Alien Property Custodian in the fact that many of the investments of German citizens in the United States were made with the object of securing control over industries contributing to the successful prosecution of war, and that in many cases these industries were at the same time being made the center of a secret service system maintained by the enemy.¹

¹ It is of interest to note that the peace treaty with Germany stipulates that the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests within their territory belonging to citizens of Germany. The net proceeds of the sale of such property, both during and after the war, are credited to Germany, and to be applied by each State to the satisfaction of claims by its citizens with regard to their property in Germany or to the satisfaction of debts owing to them by Germans. Germany on her part undertakes to compensate her citizens in respect to the sale or retention of such property. In answer to the complaint of the German delegation that this procedure amounted to a confiscation of the property, the Allies replied that it was justified on the ground that Germany's resources were wholly inadequate and, that the Allied Powers themselves were obliged to take over foreign investments of their citizens to meet foreign obligations, giving their own domestic obligations in return.

Comprehensiveness of the war powers of the Government. We have seen that the demands of the war brought about a wide extension of the powers of the Federal Government, leading Congress to enact, in the exercise of its power "to raise and support armies," legislation of a very comprehensive character looking to the mobilization of all the forces of the country deemed necessary to attain the objects of the war. At the same time the executive department of the Government was led to interpret liberally the authority conferred upon it by Congress and in some instances to act even without clear statutory authorization. In none of these cases, however, was the constitutional right of Congress or of the President to take such action questioned by the Supreme Court as the authoritative interpreter of the Constitution. It would seem, therefore, that it may be laid down as a general principle that the power of the Federal Government to prosecute a war is as comprehensive as the needs of the situation demand; and that the normal restrictions placed by the Constitution upon the central Government in favor of the States and in favor of the rights of the individual citizen, while still operative in time of war, do not in actual fact constitute an interference with the free hand of the central Government in the accomplishment of both strictly military objects and other non-military objects regarded as essential to the attainment of military ends. The problem now to be examined is the relation of the organization of the Federal Government to the conduct of the war. Was this organization equal in efficiency to the powers conferred upon it and to the tasks confronted by it? And if not, what changes were required in it and how far were these changes effective to accomplish the desired object? It was here that the Constitution of the United States was put to the severest test, and here that the most serious flaws were discovered in its machinery of government. The lessons that may be learnt from the experience of the war for the present period of reconstruction will appear incidentally in the following pages, and will be discussed at greater length in the concluding chapter.

CHAPTER VIII

CHANGES IN THE ORGANIZATION OF THE GOVERNMENT

The Executive Department in time of war. The chief burden of the war fell naturally upon the executive department of the Government. Besides being commander-in-chief of the army and navy the President was at the same time the head of a vast administrative system of departments and sub-departments which in time of peace fulfilled their functions according to set rules, but which in time of war were thrown out of gear by the necessity of undertaking new tasks and of creating new machinery to accomplish them. How far did the apparent unity of command in the administrative system prove effective? Had the President the complete control over the departments of the administration which his position of chief executive appeared to confer upon him? To what extent did the several departments cooperate with one another in order to prevent overlapping and duplication of functions? Had the President a free hand in rearranging the personnel and activities of the departments, so as to be able to make the transfers and combinations called for by the special conditions? Finally, to what degree was there cooperation between the executive departments and the various committees of Congress dealing with subjects which fell within the range of the particular department? To answer these questions adequately would require a complete history of the war administration; but they may be answered here in sufficient detail to enable us to judge more or less accurately the character of the national administration when confronted with the problems of war, and to disclose to some extent the weaknesses of the present system and the need of permanent changes in its organization and functions.

The President a "one-man" executive. Even within the limits of restrictions which will be later pointed out, the President of the United States possesses powers which no other democratic nation has seen fit to entrust to the elected head of the Government. While the Constitution of the United States was pending ratification, Alexander Hamilton undertook a defense of the decision of the Constitutional Convention in favor of a single Executive, and argued that "energy in the Executive is a leading character in the definition of good government." "They have," he said of the framers of the Constitution, "with great propriety, considered energy as the most necessary qualification of the former (the Executive), and have regarded this as most applicable to power in a single hand." And later he observed that "in the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality."¹ That the President should have associated with him a council "whose concurrence is made necessary to the operations of the ostensible Executive" would, he considered, infect the executive authority "with a spirit of habitual feebleness and dilatoriness." Even Jefferson, who was at first opposed to a single Executive and in favor of a supreme executive council as tending less towards centralization in government, confessed in later years that "plurality in the Supreme Executive will for ever split into discordant factions, distract the nation, annihilate its energies."

Extent of power he may exercise. Commenting on the above opinion of Jefferson, which he reproduces at greater length, a British statesman is led to observe that "nothing could more strongly condemn the intrinsic weakness of government by a Cabinet, especially in time of war, and nothing could more strongly recommend the necessity of a one-man Executive for democracy";² and he goes so far as to assert

¹ "Federalist," No. 70.

² Politicus, "Many-Headed Democracies and War," "Fortnightly Review," May 1, 1918.

that "while a one-man Executive will provide 'an energy and coherence of administrative action such as no other system can secure,' the British system of Cabinet government, which has been copied by the European democracies, provides vacillation, incoherence, muddle, and endless delays. That has been abundantly proved by the present war." The President of the United States is, indeed, a dictator within a limited sphere and for the fixed term of his office. In time of war it is possible for Congress to confer upon him almost unlimited power, so that the question of an efficient or inefficient war administration becomes mainly a question of the personal ability of the President and of the extent to which Congress is willing to go in authorizing executive action.¹ Assuming a willingness on the part of Congress to grant such powers as are needed by the President for the effective prosecution of the war, there is nothing to prevent him from possessing for the time practically absolute authority and from unifying in his person all of the agencies of the Government. The Constitution places no obstacle in the way of the complete centralization of all the war activities of the administration.

The President and the administrative departments. It is somewhat remarkable that while Congress was ready, as we have seen, to confer upon the President most of the powers needed for mobilizing the military forces and the financial and industrial resources of the country, it appeared somewhat reluctant to allow him a free hand in the reorganization of the administrative departments. It is of importance to observe that in respect to the question of unity of control over the administrative system at the beginning of the war, the President's

¹ It is inaccurate to speak of Congress as "conferring power" upon the President, since the President can but execute such measures as are adopted by Congress, and a delegation of the legislative power of Congress to the President would be unconstitutional. It is common practice, however, to speak of grants of power by Congress to the President, since for all practical purposes the passage of a law which brings the executive powers of the President into action is equivalent to a grant of power or conferring of authority.

position of supreme command was not in fact what it appeared to be on the surface. For unity of control implies the power to command the services of subordinates and to dictate their functions according to the commander's judgment of present needs. But it will be remembered that while the President is invested by the Constitution with the executive power of the Government, the administrative departments through which the positive legislation of Congress is put into effect are conducted in accordance with definite statutory regulations. It is for Congress to determine what shall be the organization of the Department of the Interior, for example, and what functions its officials shall perform; and the President can but play the part of superintendent, with no power to alter policies except in respect to those minor matters which Congress has left to the decision of the head of the department, who, being the President's appointee, may be supposed to be ready to take counsel with him. For a change in the duties to be performed by a department, or for a reorganization of its personnel, or for a grouping of the personnel of several departments and a combination of their functions, the President must apply to Congress for definite statutory authorization. So little was the President master of the administrative departments of the Government at the beginning of the war that it would have been an actual violation of the law for him to have used any part of the public funds to pay the expenses of any commission or board the creation of which had not been authorized by act of Congress; nor was the President at liberty to detail any part of the personnel of the existing departments to any such unauthorized commission or board.¹ In consequence, the pas-

¹ Act of March 4, 1909. Professor Ford, after quoting the text of the act, makes some illuminating comments upon the general relations of the Executive to Congress. "The inadequacy of the statutory powers of the President of the United States," he says, "is causing his office to have a strong tendency to assume the character of a dictatorship, acting without regulation or control in the exercise of the vague and illimitable war powers of the Constitution." "The War and the Constitution," "Atlantic Monthly," October, 1917, p. 492.

sage of many of the laws described above, by which Congress conferred new powers upon the President for the prosecution of the war, found the executive department without any adequate organization ready to put the law into effect; and in a number of cases it was necessary to delay action upon the law until the necessary administrative machinery could be created.

The Council of National Defense. One agency of coordination did, it is true, exist at the beginning of the war in the shape of the Council of National Defense. This body, already under consideration for several years, was created by a clause in the Army Appropriation Act of March 29, 1916, at a time when it seemed not improbable that the United States might be drawn into the war. It consisted of the Secretaries of War, the Navy, the Interior, Agriculture, Commerce and Labor, and its general purpose was defined in the act as being "the coordination of industries and resources for the national security and welfare," and its specific duties were declared to be "to supervise and direct investigations and make recommendations to the President and the heads of the executive departments as to the location of railroads with the object of expediting the concentration of troops and supplies to points of defense, the coordination of military, industrial, and commercial purposes in the location of highways and branch lines of railroad, the mobilization of military and naval resources for defense, the increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce, and the "creation of relations" which would render possible in time of need the immediate concentration and utilization of the resources of the nation. In pursuance of the functions thus assigned to it the Council of National Defense was authorized to nominate for appointment by the President an Advisory Commission "consisting of not more than seven persons, each of whom shall have special knowledge of some industry, public utility, or the development of some natural resource, or be

otherwise specially qualified, in the opinion of the Council, for the performance of the duties hereinafter provided." Moreover, the Council was authorized to "organize subordinate bodies for its assistance in special investigations, either by the employment of experts or by the creation of committees of specially qualified persons to serve without compensation, but to direct the investigations so employed." These subordinate agencies became during the course of the war exceedingly numerous, and in the performance of their specialized functions they drew upon the business and scientific ability of large numbers of private citizens who responded to the call for volunteers. Some agencies were made directly responsible to the Council, as in the case of the Committee on Coal Production, the General Munitions Board, and the Section on Cooperation with States; while other committees were constituted under the individual members of the Advisory Commission. Changes were made in the administrative machinery of the Council from time to time as experience showed the means of attaining greater efficiency, and new bodies were created to perform new functions. At the same time a number of agencies, such as the War Industries Board, which were originally organized as units under the Council, were transferred from its control and made independent bodies directly responsible to the President.¹

Functions performed by the Council. It is important to observe that the functions of the Council were strictly advisory in character, and that its subordinate boards and committees possessed no administrative power to carry into effect the recommendations made by them. From the start the Council laid stress upon its "function of adjustment." It "sought to serve as a channel through which the best professional and industrial intelligence of the country could make itself most ef-

¹ The organization and personnel of the Council of National Defense and of its Advisory Commission and of the subordinate boards and committees may be found in the appendices to the First and Second Annual Reports of the Council.

fectively available to the Government departments." It recognized the fact that the war was "essentially a war of the mechanic and of the machine," and that the "direction of the machinery of American industry for the national defense necessarily involves the creation of an organization of great flexibility. . . . Constantly recurring demands for increases in personnel and for new efforts in unexpected directions have had to be met as the war progressed. It has been the effort of the organization of the Council of National Defense to hold itself in constant readiness to meet such new demands and to shift its ground and expand its facilities in the interest of the national service."¹ In the Second Annual Report the director described the work of the past year as having consisted in "drawing together immediately the country's resources and making them available to the authorized executive agencies of the Government," and in "initiating and planning the organization of new agencies which could be clothed as need demanded with the requisite power." "The Council has served," the director said, "as a great administrative laboratory through which new plans and new and necessary functions could be initiated and developed, and where effective action demanded, passed on to permanent or emergency agencies of the Government." Cooperation between the subordinate agencies of the Council in the formulation of policies was obtained in some measure by giving representation upon the several boards to members of other boards, and thus permitting a general discussion of common objects.

Criticism of the work of the Council. Nevertheless, in spite of the elaborate program which the Council mapped out for itself, considerable criticism has been directed against it, and against its auxiliary Advisory Commission, from various quarters because of its inability to act as the coordinating agency so urgently required by the administrative departments. Its failures have been summed up by the Director of the

¹ First Annual Report of the Council of National Defense, for the fiscal year ended June 30, 1917, p. 8.

Institute for Government Research under the following headings: First, the Council did not respond to its opportunity as a body to formulate general plans for the mobilization of industry, nor did it even formulate a consistent program for its own activities by attempting to define the jurisdiction and duties of the various committees and subcommittees which were organized under it. Secondly, it failed properly to coordinate its own activities with those of the Advisory Commission, so as to prevent duplication of organization and functions. Thirdly, the Council made little attempt to build up a strong administrative organization manned by a permanent personnel of experts. Fourthly, some of the committees failed to remember that their powers were of an investigatory and advisory character, and assumed administrative functions which came into conflict with those of the War Department. Lastly, the mistake was made of making the committees in their relations with producers agencies for representing the Government instead of agencies for the representation of the producers, with the result that in a number of cases the committees, being composed of representative producers, had to recommend the placing of contracts with their own members. This mistake was in due time appreciated, and the committees were reorganized accordingly.¹

Proposed Ministry of Munitions. It is doubtful whether, even had the Council of National Défense responded fully to the demands made upon it, an efficient war administration could have been obtained. For the task thrown upon the administrative department was not merely that of formulating a general program of operations, but of distributing the duties thus determined upon to the proper departments, and of bringing the whole series of functions under one centralized control. To accomplish this three-fold task was not only a colossal undertaking in itself, but required greater powers over the administration than Congress had thus far conferred upon the

¹ W. F. Willoughby, "Government Organization in War Time and After," pp. 14-16.

President. The war had not been in progress many months when it became clear to all observers that the wheels of the administrative machinery were not all in gear, and criticism both in the public press and in Congress demanded that steps be taken to secure greater coordination and efficiency. This demand became all the more insistent when the War Department appeared unable to secure the necessary equipment required in the great training camps scattered throughout the country. Supplies of clothing were inadequate and arms could only be supplied to those actually entraining for the front. An inquisitorial examination of the Secretary of War before the Senate Committee on Military Affairs failed to convince that body that satisfactory progress was being made. In consequence two distinct bills were brought forward by the chairman of the Committee, one providing for the establishment of a new Department of Munitions, and the other providing for the creation of a War Cabinet. The proposed Department or Ministry of Munitions was intended to replace the War Industries Board, which had been created by the Council of National Defense, but which lacked the administrative powers necessary to carry its decisions into effect. Its director was to be given a seat in the Cabinet and to be entrusted with complete control over supplies of every kind for the army and the navy. The President, however, opposed the creation of a new department, and undertook instead to strengthen the position of the War Industries Board by taking it from under the Council of National Defense and making it "a separate administrative agency" to act for him and under his direction.¹

The proposed War Cabinet. The proposal for the creation of the War Cabinet was urged with greater insistency. The Chamberlain bill provided that the new organ of control should be composed of "three distinguished citizens of demonstrated ability to be appointed by the President, by and with the advice and consent of the Senate, through which War Cabinet the

¹ See above, p. 150.

President may exercise such of the powers conferred on him by the Constitution and the laws of the United States as are hereinafter mentioned and described." The powers of the War Cabinet as set forth in the bill may be summarized as including the power to supervise, coordinate and control the functions and activities of all executive departments, officials and agencies; to obtain information from and to utilize the services of any of the executive departments and their officers, and to issue, subject to review by the President, the orders necessary to make their decisions effective. The War Cabinet would thus have become a small directorate with practically unlimited directive powers, but with small administrative powers. Had it actually been created, whatever may be thought of the probabilities of its effective operation, it would undoubtedly have come into conflict with the constitutional powers of the President as commander-in-chief of the army and navy. At the same time it would have restricted his powers as chief executive, since he is made by the Constitution ultimately responsible for the execution of the law even by those into whose hands Congress may have expressly entrusted that duty. Again, as in the case of the Ministry of Munitions, the opposition of the President and the substitution of an alternative proposal led to the abandonment of the bill.

The Overman Act. In the meantime, while the above plans were being debated in Congress, the chairman of the Senate Committee on Rules, Mr. Overman, at the request of the President introduced a bill "authorizing the President to coordinate and consolidate the executive bureaus, agencies, officers, and for other purposes, in the interest of economy and the more effective administration of the Government." The act, as finally passed on May 14, 1918, empowered the President to make such "redistribution of functions" among the executive agencies as he might deem necessary, including any functions hitherto by law conferred upon any executive department or officer, in such manner as in his judgment should seem best fitted to carry out the purposes of the act, and to

issue the necessary regulations and orders. Moreover, it empowered the President to coordinate or consolidate, in such manner as he might deem most appropriate, any executive commissions or offices then existing, and to transfer the duties or powers, as well as the personnel, from one existing department or bureau to another. By the terms of the act the authority of the President was to be exercised only in matters relating to the conduct of the war, so that no general or permanent reorganization of the administrative services was contemplated. As a matter of fact, by the time of the passage of the act most of the serious difficulties of the war, with the exception of the problems connected with the production of aircraft, had been more or less satisfactorily adjusted, with the result that the President did not feel it necessary to effect any important changes in the organization of the departments. Without needing any special authorization of Congress, the Council of National Defense had made a practice of holding weekly meetings which the heads of the more important war agencies were invited to attend; while on his part the President had held similar weekly meetings with the same officials, which enabled him to assist in the coordination of their respective functions. What was needed, in the estimation of many observers, was a body which could at once "plan" and "administer." In order that such a body might plan, it should have been free from the burden of administrative detail, yet not so devoid of administrative powers as to be unable to see that its plans were put into effect precisely as devised. The existing Cabinet, with enlargements, might have proved such a body, had the powers of the Overman Act been granted to the President at the time of the creation of the Council of National Defense.

The surrender of congressional powers. During the passage of the Overman bill strong opposition was manifested by senators who felt that the constitutional powers of Congress were being abdicated in favor of the President. Liberal as had been the previous grants of power to the President, they

were in form at least the expression of the definite will of Congress, which had decided upon the policies embodied in the law, whatever measure of freedom might be accorded to the President in the determination of the means by which those policies were to be carried out. To Congress, it was argued, belonged the constitutional authority to "raise and support armies," and to pass all laws necessary and proper to accomplish that purpose. The President was but the executive head of the nation, whose duty it was to carry out the policies decided upon by Congress, not to frame them himself. The proposal to give him unlimited power to reorganize the administrative departments was to create an autocracy in place of a democracy. Curiously enough, the opposition expressed against the surrender of so large a part of the control of Congress over the administration seemed to be considerably more determined in the case of the Overman Act, where the grant of power was to the President directly, than in the case of the proposed War Cabinet, where the grant of power was to a new body, a sort of "super-cabinet" unknown to the Constitution. It must be conceded that there was justice in the contention of certain senators that it was the part of Congress as a coordinate branch of the Government to map out lines of action and to consult and advise with the President as to the most effective measures to adopt. But on the other hand Congress had not given any exhibition of constructive statesmanship, and the initiative in all of the great war measures previous to the debates on the War Cabinet had been taken by the Executive. As is inevitable under any form of government the actual control tends to pass to that department which in time of emergency shows itself best prepared to meet the situation. The forms of constitutional law may be preserved, but the substance of power will be exercised by the persons who are recognized as most capable of exercising it. In this instance the general public was but little disturbed by those members of the Senate who protested against the subordinate rôle to which Congress had been reduced.

Lack of cooperation between Congress and the Executive. The passage of the Overman Act, while marking perhaps the most striking example of friction between Congress and the Executive, does not stand alone as an instance of the lack of effective cooperation between them. Without raising the question as to which of the policies at issue on several occasions was the wiser to follow, the fact must be noted that in spite of the imposing array of powers conferred upon the President there were sharp differences between the two coordinate branches of the Government, and that these differences found no available means of prompt solution. The differences were, in truth, inherent in the very nature of the constitutional relations between the two departments, and it is fairer to place the blame for them as much upon the system of government as upon the individual parties to the dispute. The Constitution does not prevent effective team work between the President and Congress, nor on the other hand does it compel it. Apart from his limited powers as commander-in-chief of the army and navy the President is but the constitutionally appointed agent of Congress, which must pass the necessary legislation before he can act. The term "chief executive," as applied to the President is apt to mislead the ordinary citizen into supposing that certain positive powers, common to executive positions in business organizations, are inherent in the office of the President; whereas in so far as the normal activities of the individual citizen and of national industrial enterprises are concerned the President is powerless to make demands or to impose restraints, except as planned for him by Congress or specifically left to his discretion by Congress. If Congress is liberal in its grants of power to the President in time of war, both as regards the means and resources required for the prosecution of the war and as regards full liberty in the choice of auxiliary agencies, the President can become the head of as unified and efficient a war administration as it is possible for the wisdom of the executive department to devise. The value of the centralization of executive authority

provided for by the Constitution may then be experienced to the full. On the other hand if Congress is suspicious of the Executive, if it delays to grant him the necessary sinews of war, if it restricts him in the use of administrative agencies, the alleged advantages of a "one-man executive" may prove wholly illusory. The question whether cooperation shall exist depends, therefore, upon the statesmanship of the two coordinate bodies of the Government. The state of "constitutional unpreparedness," to which reference has previously been made, in which the United States found itself at the beginning of the war by reason of the separation of the powers of government between the several departments, each checking and balancing the other, was not an absolute barrier to success. It merely demanded more of the human elements in command of the machinery of government than a more simplified system, like that of cabinet government, would have done.

Position of the President as political leader. No mention has been made of the influence of the President over the affairs of the country in his rôle of political leader, for this is a matter not dependent upon the will of Congress but based upon the position which the President may by right assume in virtue of his constitutional position as chief executive. The sources of this influence were well expressed by the present incumbent of the office in earlier days: "The nation as a whole has chosen him (the President), and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. . . . If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and character. Its instinct is for unified action, and it craves a single leader."¹ That the influence of the President has grown greatly in recent years is an obvious histor-

¹ "Constitutional Government in the United States," p. 68.

ical fact, and there have not been wanting voices of protest against what is regarded as the subjection of Congress "to such a degree of executive domination as to threaten the stability of the principle of departmental independence involved in the distribution of the several powers among the three branches of government."¹ Senator Sutherland sees a tendency on the part of the public to regard the President as a superior officer and as the sole repository of power, rather than as a "coequal member of a tripartite organization." With the advent of war the President was clothed, he says, "with the rôle of a virtual political dictatorship." "The danger of such a situation," he continues, "is that Congress will be driven from its traditional and constitutional place in public thought, as a coordinate branch of the Government, with the unfortunate result that subordination and obedience will tend to replace common counsel and team work."²

Personal responsibility assumed by President Wilson. That the burden thrown upon the office of the President during the war appeared at times to be too heavy for any single man to carry was the result not so much of the centralization of power in the hands of one man, as of the unwillingness of the President, in the opinion of certain observers, to delegate his authority to his subordinates. If the President chose to reserve to himself the final decision on a wide variety of controversies among the multifarious boards and commissions of the administration, it was not from any constitutional obligation to assume such duties, but from his personal belief that such a centralization of authority was the more advisable course to pursue. At the outbreak of the war there was no organization upon which the President could unload the responsibilities of his office, and the task of creating such an organization would have been one of exceptional difficulty. Nevertheless it was thought by many that some such delegation of authority should have been attempted. One plan proposed would

¹ G. Sutherland, "Constitutional Power and World Affairs," p. 75.

² *Ibid.*, p. 76.

have shifted to a subordinate war council the power, subject to certain broad lines of policy adopted in consultation with the President, to determine upon plans for the prosecution of the war, and to entrust the execution of those plans to an executive board which should represent the heads of the branches of the administration performing functions connected with the war in its industrial as well as in its military and naval aspects. An analysis by diagram of the various boards, commissions, and individual directors and administrators in their relations to the President would give us a huge wheel, at the hub of which would be the President in his capacity as creator, by congressional authority, of the branches of the administrative machinery and as ultimate coordinator of their functions and umpire of their conflicts; whereas it was contended that the proper and efficient relationship between the President and the ramifications of his war administration should have been that of general superintendent and director of policies, with power distributed to his subordinates through successive delegations of authority. The subject was freely discussed in Congress and in the public press, but no constructive plan, satisfactory to the President, could be agreed upon.

Impediments resulting from the committee system in Congress. The failure of the two houses of Congress to co-operate with each other, as well as with the Executive, in the expedition of public business was due to the constitutional impediment of a bi-cameral legislature, but the degree of the failure was increased greatly by the organization of the two houses, for which political tradition and not the Constitution was responsible. Legislation in both houses is accomplished through the agency of committees, to which all proposed measures are referred; and the report of these committees upon a bill is generally decisive in determining its fate. By a rule of long standing the chairmanship of the committees falls to members not primarily upon the basis of qualifications possessed by them for the work, but upon the ground of length of service in Congress. The result is that while the chairman of the com-

mittees generally represent their party on questions of domestic politics, which have been an issue in elections, it is quite possible that in the event of a new issue arising, such as the action to be taken by the United States in answer to the renewal of submarine warfare by Germany, the chairmen of the committees may not represent the majority either of the house as a whole or even of their own political party. By an unfortunate coincidence the outbreak of the war found the heads of a number of the most important committees sharply divided as to the policies to be pursued. The Chairman of the Foreign Relations Committee of the Senate was strongly opposed to the declaration of war, while the chairman of the House Committee was equally strongly in favor of it. The chairman of the House Committee on Military Affairs was opposed to any plan of conscription for the army, whereas the chairman of the same committee in the Senate was strongly in favor of that method of raising troops. The chairman of the Committee on Ways and Means of the House of Representatives voted against a declaration of war on the ground that it did not involve either the moral or the material interests of the country, while the chairman of the Senate Finance Committee held the opposite opinion. The result was that whatever the desire of the majority of both houses to expedite the passage of the necessary war measures, delays were experienced in pressing the committees in charge to take prompt action upon them.

The system of control through licences. In addition to the problems connected with the reorganization of the administrative departments mention must be made here of two important devices resorted to by the Government to obtain control over certain private industries and to secure the performance of certain services which it was desirable should retain the character of private enterprises. We have seen above that the Government issued licences to persons engaged in import and export business, to food dealers, mine operators, and producers and dealers in fuel oil. The advantages of this system of licences were that it enabled the Government to fix for each

industry separately the conditions to be met by persons desiring to engage in it or already engaged in it, and to enforce the observance of those conditions by threatening to withdraw the licence of a given producer who refused to abide by the regulations imposed. The regulations could thus be drawn up and enforced by administrative officials without the necessity of having them take the more rigid form of laws, and without giving rise to a right of appeal to the courts by persons accused of violating them. The prediction has been made that the manifest advantages attending this method of control during the war will cause it to be resorted to by the Government when called upon to bring industrial interests under greater control.¹

Control through subsidiary corporations. The second of these devices consisted in the establishment of subsidiary corporations for the performance of certain specific activities. The work of several of these corporations has already been referred to in connection with the new power entrusted by Congress to the executive department. Their advantages as administrative agencies are described as consisting in the definite segregation of the particular service, both financially and administratively, from all other services, so that the particular enterprise will have its own property, its own revenues and expenditures, and its own accounting and reporting system. An enterprise producing revenue should have a system of profit and loss accounts similar to that of the ordinary private corporation, and for this purpose it should have financial autonomy. Moreover the corporate form of organization facilitates the handling of contractual relations with outside parties to better advantage; it admits of the appointment of a board of directors chosen with special reference to their technical competence; and it keeps the service on a purely business basis outside the pressure of partisan politics.² The interest attach-

¹ W. F. Willoughby, "Government Organization in War Time and After," p. 355.

² *Ibid.*, p. 356. The subject is treated in greater detail in Chap. V of the "Problem of a National Budget," by the same author.

ing to this form of administrative agency is not merely due to its unusual character, but to the probability of its future use by the Government in the handling of industrial problems. At the present moment, for example, there is before Congress a plan advanced by the Railway Brotherhoods and endorsed by the American Federation of Labor, which proposes that the railways of the country be purchased by the Government and their operation be entrusted to a private corporation, run by the employees, which is to pay the Government a rental out of the receipts of operation.¹

¹ A convenient reference manual of the agencies created during the war for the administration of the varied activities of the Government may be found in "A Handbook of the Economic Agencies of the War of 1917," prepared in the Historical Branch, War Plans Division of the General Staff 1919

CHAPTER IX

THE SEPARATE STATE GOVERNMENTS. NEW LEGISLATION AND NEW ADMINISTRATIVE ACTIVITIES

The relation of the separate state governments to the war. The burden of conducting the war fell naturally upon the Federal Government, for to it was confided by the Constitution the task of raising and supporting armies and its chief executive was constitutional commander-in-chief. In a war of smaller dimensions, such as that with Spain in 1898, it might well have been possible for the separate state governments to remain entirely unaffected by the conflict, and to do no more than acquiesce in such limited war measures of the Federal Government as the incorporation of their state militia into the federal forces. But the recent war, in calling for the mobilization of the man power and the industrial resources of the entire nation, left no corner of the country's life untouched, and the state governments necessarily felt the pressure of its demands. In the first place the state governments were called upon to yield to the encroachments upon their authority and jurisdiction involved in the assumption by the Federal Government of the wide range of powers which have been described in the preceding chapter. In the second place the exceptional demands created by the war led the state legislatures to enter new fields of legislation in order to supplement the measures taken by the Federal Government and to meet more satisfactorily the special local conditions which were beyond the reach of the federal laws. In the third place the necessity of securing cooperation between the separate executive departments of the state governments, and between the state executives as a body and the federal executive department, led to the establishment of new and more intimate relations between these distinct agencies of government, and tended to break down the

barriers of isolation which have long been a characteristic of American local government. In many instances the Federal Government found it convenient to fall back upon the governmental machinery of the States for the enforcement of new regulations hitherto not within the scope of the activities of the central government.

Subordination of state authority to federal. **Jurisdiction over persons.** The dividing line between the powers of the central government and those of the separate states, as established by the Constitution, has never been entirely clear, but during the course of decades of constitutional interpretation by the courts a fairly satisfactory basis for the adjustment of disputes of jurisdiction has been worked out. Where state and federal jurisdiction overlap the practical rule has been adopted that the State may enact legislation valid within its borders until Congress decides to enter the field, when the local laws must give way to the national law in so far as the former are inconsistent with the latter. In many cases, as in that of the Food and Drugs Act of 1906, the federal legislation may in no way conflict with state legislation, or may either supplement it, where the state legislation is less comprehensive than the federal law, by restricting importations from other states, or, where the reverse is the case, merely assist in the enforcement of the state law against importations from other states. In normal times few controversies have arisen except those in connection with the power of Congress over commerce between the States, but there has been on the whole a steady increase in the scope of the authority of the Federal Government. With the outbreak of the war the States found themselves obliged to surrender a far wider range of jurisdiction than had ever been demanded of them at any time in the past history of the country. The powers assumed by the President as commander-in-chief of the army and navy intruded upon the civil and criminal jurisdiction of the state courts; while cantonments were built in a number of the States and formed as it were federal cities, not unlike the District of Columbia, which re-

mained outside the control of the State. The troops in training in these camps continued to remain subject to the jurisdiction of the Federal Government even when visiting neighboring cities on leave of absence, and special military police patrolled the railway stations and other centers of city life. In certain cases, as we have seen, the authority of the War and Navy Departments was extended even to the point of demanding of a city that it reform its government and suppress immoral conditions which were a danger to the health and morale of the federal troops temporarily present in the city. Moreover, in the interest of protecting the material welfare of the men drawn into the federal army, Congress undertook to interfere with the normal operation of legal procedure in the States, and to suspend the judgments of state courts in cases where the failure of the defendant to appear in court to answer to a suit was due to his being in the military service of the United States. The process of eviction for failure of the family of a soldier to pay rent was suspended, and installment contracts were subjected to special limitations in favor of the party in military service. In these and other ways the normal jurisdiction of the State over all persons within its borders was seriously restricted.

Loss of state control over railroads. The extension of federal control over the railway systems of the country necessitated the surrender by the States of their power of control over transportation within the State in so far as such transportation formed a necessary link in the chain of commerce between the States. Here it is of interest to note that the dual system of government in the United States has resulted in a form of divided control over the railways which has been at once a source of embarrassment to the railways themselves and an obstacle to efficient regulation in the interest of the public. The Interstate Commerce Commission has long sought to reconcile the conflicting jurisdictions of the Federal Government and of the several States, and the railroads have freely asserted their desire for centralized control in preference to

the rule of their "forty-nine masters," the individual state railway commissions added to the federal commission. With the assumption of federal control over the railways in December 1917, the state railway commissions retired temporarily from business, and special state laws regulating rates and service within the states were suspended in their operation pending the return of the railways to their former owners. The federal railway director general was thus given the opportunity not only to prove the economic advantages of a unified system as against isolated competing lines, but at the same time to demonstrate the administrative advantages of a single centralized control as against the former combination of federal and state control. In like manner the control assumed by the Federal Government over the telegraph and telephone lines necessitated the abandonment of the power of the state public service commissions over those services within the state borders, and reduced the functions of the latter bodies to the regulation of local public utilities.¹

Encroachments of the Food and Fuel Control Act. The price-fixing powers of the federal Food and Fuel Control Act invaded the domain of state legislation at numerous points. In normal times the determination of a maximum price for wheat would have been within the competence of the several state legislatures alone, and could not even have been indirectly undertaken by the Federal Government through its power over interstate commerce. The licencing of food dealers by the Food Administration and the penalty imposed of withdrawing the licence for failure to comply with the regulations prescribed

¹ In two instances the power of Congress to exercise exclusive jurisdiction over the railroads and telegraphs was contested by state public utilities commissions which sought to enjoin the companies in question from enforcing rates different from those already established. The Supreme Court held that the action of the Federal Government was a legitimate exercise of the war power and that a State had no right to interfere with its measures of control. *Northern Pacific Railway v. North Dakota*, 250 U. S., 135; *Dakota Central Telegraph Company v. South Dakota*, 250 U. S., 163.

constituted an assumption of combined legislative and executive functions which, but for their exceptional justification as war measures, would have been strictly within the jurisdiction of the state governments. Similarly, the fixing of prices for various grades of coal, the restrictions placed upon the use of coal for purposes not deemed essential by the Fuel Administration, the decree that non-essential factories be closed on Mondays during a critical period, and the qualified compulsion exercised in the form of withdrawing supplies altogether, were all acts normally within the sphere of government reserved to the several States. The same is to be said of the allotment of the raw materials of industry among producers according to the character of the industry, and the determining of priorities in respect to inland transportation and shipping. Some of these acts were, of course, beyond even the power of the state legislatures to prescribe without a previous amendment to the state constitution authorizing the assumption of such control over private industry. It was the urgent necessity of the situation which not only led public opinion to acquiesce in the subordination of state interests to national interests, but secured its assent to the invasion of those private rights of the individual citizen which it is one of the characteristic functions of an American state constitution to protect. The striking nature of the invasion of the domain of state legislation by the war measures of the Federal Government may be seen in the fact that in the opening months of the war the Supreme Court of the United States rendered a decision nullifying the Federal Child Labor Law as being an unconstitutional extension of the powers of the Federal Government over interstate commerce into the reserved sphere of state government, while at the same time Congress and the President, in the exercise of "war powers," were setting up machinery of control a hundredfold more comprehensive in its encroachments upon normal state life.

Federal prohibition legislation and the States. One further war measure of the Federal Government which caused

a serious conflict with the normal rights of the state governments, and which led to complications of jurisdiction that are still¹ being felt, was the enactment by Congress of legislation restricting the manufacture and sale of intoxicating liquors. The Food and Fuel Control Act carried with it a rider prohibiting the use of food materials in the production of distilled liquors and at the same time authorizing the President to apply at his discretion the same restrictions to the production of beers and wines. This measure was followed by a more drastic provision, annexed as a rider to the Food Stimulation Act of November 21, 1918, which forbade the use of food-stuffs in the production of beer, wine, or other "intoxicating" malt or vinous liquors after May 1, 1919, and until the end of demobilization, and the sale of such liquors after June 30, 1919, and until the end of demobilization. This provision, known as the War-time Prohibition Act, was in every respect a prohibition and not a food conservation measure, and was, as we have seen above, an attempt to force upon the States which had not adopted prohibition laws a temporary régime of prohibition pending the ratification of the amendment to the Federal Constitution. Congress, however, failed to define the scope of the word "intoxicating," with the result that dealers in the "wet" States were at first at a loss to know what percentage of alcohol rendered a beverage intoxicating, and they finally obtained different rulings on the subject from their respective state governments. Evasions of the law were numerous, owing to the fact that no adequate machinery for the enforcement of the law had been provided by Congress, and the officials of the "wet" States were naturally somewhat indifferent to the observance of a law which they believed to be in fact, if not in law, a contravention of the constitutional rights of the States. The subsequent passage by Congress of the Volstead or National Prohibition Act of October 28, 1919, settled the question of the alcoholic content of intoxicating liquors. While declaring the act constitutional the Supreme

¹October, 1919.

Court, however, dismissed the suits brought by the Government against the dealers who, prior to the passage of the act, had manufactured and sold beers and wines with a larger percentage of alcohol than that laid down in the act as constituting an intoxicating liquor.¹

Enlarged scope of state activities. But if the war had the effect of restricting the sphere of the normal jurisdiction of the States, it at the same time led the States to enlarge the range of their local activities and to enter new fields of legislation hitherto closed to them. These new activities of the state governments were partly the result of a desire to cooperate with the Federal Government in the enforcement of laws and regulations for which the machinery of the Federal Government was inadequate, and partly the result of a demand on the part of the public for a greater measure of protection against domestic violence and against economic oppression arising out of the exceptional conditions created by the war. It has been pointed out above that the dividing line between the powers reserved to the state governments by the Constitution and those delegated to the Federal Government is not at all points a clear one, but that satisfactory adjustments have been worked out by the courts to answer the difficulties that have from time to time arisen. The abnormal conditions which grew out of the war not only threw these older adjustments out of balance, but called for new adjustments to meet the new situations. The result was that the "constitutional unpreparedness" of American democracy manifested itself quite as much in the difficulty experienced by the parts of the federal state in cooperating efficiently with the central government, as in the failure of the people at large, by reason of being unaccustomed to discipline, to respond immediately to the demands made upon them. The latter failure was, as we have seen, in a large measure made good in

¹ *United States v. Standard Brewery*, decided January 5, 1920. For the constitutionality of the War-time Prohibition Act and the National Prohibition Act, see above, pp. 154-157.

time, and voluntary agencies were created to do the work which an autocratic government might have done through compulsory agencies. The difficulty experienced by a decentralized form of government was likewise overcome in time but to a less satisfactory degree, owing not so much to the lack of a desire on the part of the States to cooperate with the Federal Government, as to the obstacles inherent in the existence of isolated state units. Each of the forty-eight state constitutions contained a variety of restrictions upon the powers of the state legislature and embodied its own conception of the limits to which the state government might go in restricting the freedom of its citizens. At the same time the state legislatures did not possess the sweeping grant of power contained in the clause of the Federal Constitution empowering Congress "to raise and support armies."

Organization of Reserve Militia and State Constabularies. In order to meet the emergency caused by the transfer of the state militia into the national army many States found it necessary to create special reserve forces for the maintenance of law and order at critical times. These bodies were known as Home Guards, State Guards (by contrast with the National Guard or former state militia), State Defense Guards, State Reserve Militia. They were as a rule recruited by voluntary enlistment, and varied in number in the different States. In Maryland provision was made that if the number of volunteers was inadequate, male citizens might be drafted to the number required. The duties of these home guards were generally confined to calls for emergency service in cases where the local police force was inadequate to preserve the peace, but in some States they were assigned the wider functions of enforcing the laws of the State. The same circumstances, however, which called for the creation of the reserve militia gave an impetus to the movement already in progress of establishing permanent state constabulary forces, or "military police," to act as a flying corps at the disposal of the governor for the enforcement of the law. Pennsylvania had led the way in

1906 by the creation of such a body, modeled on the Canadian northwestern mounted police, and consisting of four troops of fifty men each. In 1917 New York, South Dakota, Rhode Island, Connecticut, and other States established similar bodies, and in 1918 Oregon followed suit; while New Jersey failed to secure popular assent to a bill submitted to a referendum. Texas organized a Rangers' Home Guard of 1000 men to protect its border against raids from Mexico. In States where there is no such constabulary force the governor is obliged to rely for the enforcement of the law upon the local sheriffs and constables in the rural districts and upon the municipal police in the cities. Only in the event of a riot or of organized resistance to the law is it feasible to call out the state militia, and in many instances the delays incident to drawing civilians from their ordinary pursuits have had serious results. The existence of a professional state guard, although small in number, would make it possible for the governor to suppress disturbances in their incipient stages.¹ In addition to creating these state guards, some States authorized their cities to appoint special emergency police and provided for the formation of county guards and volunteer fire companies.

State aid in the administration of the Selective Service Act. The adoption of the Selective Service Act was the most dramatic and at the same time the most far-reaching measure taken by the Federal Government for the successful prosecution of the war. Yet it was a measure for which the existing machinery of the Federal Government was completely inade-

¹ The opposition to the creation of State constabulary forces has come chiefly from the labor unions, which fear that the troops will be used to interfere with strikes by preventing picketing and breaking up meetings of the workers; whereas local police and the unprofessional state militia may be expected to show greater sympathy with the strikers and to act with less determination. The recent experiences of the steel strikers in Pennsylvania have tended to justify this attitude. The answer should be, not the abolition of the State constabulary, but the enactment of legislation to replace the present arbitrary practice of the courts in issuing injunctions in labor disputes.

quate, and which must therefore have caused great confusion in its enforcement and great injustice to individuals had it not been possible for the Federal Government to call upon the assistance of the state authorities and their subordinate local agencies. The administration of the draft was, in accordance with the terms of the act, carried out by means of a large number of draft boards, one in each county or "similar subdivision" in each state, and one for approximately each 30,000 of population in each city of 30,000 or over. The act provided that the boards should be appointed by the President, and should consist of three or more members, none of whom should be connected with the military establishment, to be chosen "from among the local authorities of such subdivisions or from other citizens residing" therein. The object of this provision was obviously to secure men who were familiar with local conditions, and who would either know personally the circumstances of the cases that came before them or else be in a position to obtain first-hand knowledge from others. Since the boards were composed in many cases of political leaders, there were from time to time charges of favoritism in respect to exemptions from service where pressure could be brought by influential persons. In a few instances legal proceedings were brought against individual members of the boards; but in comparison with the immense volume of work performed by the boards these isolated charges are a striking testimony to the general fairness with which their rulings were made. Owing to differences of temper and of judgment in the membership of the various boards it was inevitable that exemptions should be granted in one locality and refused on the same grounds in another. The circumstances calling for exemption were infinite in variety, and it was in the nature of things impossible to apply in a hard and fast manner the instructions sent out by the office of Provost Marshal General E. H. Crowder, who was in charge of the entire draft system. In a large measure the divergencies of the local boards were rectified by the district boards of appeal which were appointed by the President in each federal

judicial district. These district boards were authorized by the act to "review on appeal and affirm, modify, or reverse any decision of any local board" having jurisdiction within the district, and to hear cases not included in the jurisdiction of the local boards. Their decisions were final, subject only to the right of the President to permit an appeal. It should be noted that the appointments of the President were made in accordance with recommendations of the state governors, so that the fullest cooperation between the national and the state governments was thereby obtained.¹

Miscellaneous laws in aid of men in service. As an item in a general program of preparedness military instruction had been provided for in several States even before the declaration of war, while other States hastened to adopt a similar program for the succeeding school year. These measures were later supplemented by the action of the War Department in establishing units of a Students' Army Training Corps in all of the colleges and universities which had a minimum enrollment of over one hundred students above high school grade. The students joining this corps became active members of the army on active duty and subject to military discipline. Their housing, subsistence and instruction were provided for by the several institutions under contract with the Government. Several States enacted laws providing for temporary financial relief for the families of enlisted or drafted men in cases of need. In New York State the legislature authorized cities, counties, and villages to provide financial aid for the families of enlisted men; in Maine the families of volunteers were supported partly by state aid and partly by aid from the county or city of their residence; while Vermont paid state pensions to the dependents of members of the national guard. The

¹ For further details of the work of the local and district boards, see the Second Annual Report of the Provost Marshal to the Secretary of War, pp. 268, 276. A valuable survey of the administration of the Selective Service Act may be found in "The Spirit of Selective Service," by Maj. Gen. E. H. Crowder.

passage of the federal War Risk Insurance Act, with its allotment and allowance provisions, removed the necessity for state aid to a large degree, and probably explains the failure of the States as a body to pass remedial legislation. Several States in which the sale of intoxicating liquors was still legal passed laws forbidding the sale of liquor near military camps. In Maryland provision was made for a dry zone within two miles of any camp, and special police were appointed to patrol it. A few States anticipated the moratory and stay law of Congress by their own moratory and stay laws, in accordance with which suits begun against enlisted men during the war were suspended until six months after the war, and debts owing by them could not be collected during the continuance of the war. In several States special measures were taken to assist men absent in military service. In North Carolina Soldiers' Business Aid Committees were appointed by the county councils to render help in the management of their business affairs; while in Wisconsin the state council proposed that there should be appointed a "home soldier" to watch over the interests of each soldier in service abroad and to be in general his personal representative. In a number of the States steps were taken in the form of constitutional amendments and legislative enactments to permit absent voting of men in military service. Application was made by the state officers to the Adjutant-General to have the vote taken in the camps, permission being granted when it did not cause serious interference with military efficiency.

Laws in aid of food and fuel conservation. We have seen above that the Food Survey Act and the Food and Fuel Control Act laid the basis of a national policy of food and fuel conservation, and that federal agencies were created to secure its enforcement. But in this instance, as in many of its other war measures, the Federal Government was unable to accomplish more than half its purposes by its own direct enactments. Lack of administrative machinery, as well as past traditions of more restricted functions, made it impossible for the Government

to do more than frame regulations which could be enforced uniformly throughout the country without undue friction. Willing as the people of the States might be to cooperate with the Federal Government, it was politically inexpedient for Congress to subject them to general federal laws which might be unsuited to their particular local needs. In consequence the state governments found it necessary to pass local laws supplementing the federal law. These laws were of the widest variety and in one State or another dealt with the increase of production of farm crops, the marketing of farm products, the prohibition of storing or hoarding foodstuffs so as to corner the market and enhance the price, the establishment of municipal markets for the purchase and distribution of food supplies, the adoption of cooperative agricultural projects, and the prohibition of conspiracies to limit the output or control the price of coal. In addition to these and other measures valid only within their several state boundaries, the state governments rendered valuable assistance to the Federal Government in the administration of the federal law. The federal food administrator announced at the outset of the undertaking that the administration could only be carried out through the coordination of existing legitimate agencies and through the services of volunteer workers. In the selection of these agencies and of the local food administrators, as well as in the enforcement of the regulations adopted, the cooperation of the state governments made it possible to carry through a most elaborate program with the least possible friction and a minimum of expense.

Laws to meet labor problems. We have seen the measures taken by the Federal Government to mobilize the labor required for munition works and other war industries, as well as the variety of mediation and arbitration commissions created to adjust labor disputes and prevent the recurrence of strikes. But while the measures of the Federal Government were limited in their scope to the problem of labor in essential war work, a number of the individual States took drastic measures

to remedy the general shortage of labor due to the operation of the draft law and to the rush of labor to the more highly paid war industries. Maryland, West Virginia, and Kansas led the way in 1917 with "work or fight" laws, and a number of other States followed suit in 1918. The Maryland law required the registration of able-bodied men between eighteen and fifty years of age who were not usefully employed, and authorized the governor to assign them to some public or private employment; failure to register or to do the work assigned was punished by fine or imprisonment; no exception was made between rich and poor, but students and strikers were excepted. The West Virginia law made each week of idleness a separate offense. The Kansas law defined vagrancy to include refusal to accept employment. The Kentucky law rejected the plea of inability to obtain work as a defense, but other states recognized the possibility of inability to secure employment and merely required, as in New York and Massachusetts, that persons should apply to a designated public agency to secure employment. South Dakota granted to the state Council of Defense the power to "impress" into public or private service all unemployed persons. Nebraska reached the same object by defining sedition to include habitual idleness or refusal to accept obtainable work. Distinct in purpose from the above legislation relating to compulsory work were the laws, such as that of Vermont, which suspended the operation of the existing statutes relating to hours of employment of women and children during the continuance of the war. These laws were severely criticised by persons interested in social reform as being likely to result in harm to the women and children which would more than counterbalance the increased supply of labor. In several States provision was made that children might be released from attendance at school without loss of standing if they were engaged in farm work.

Laws to assist in Americanizing immigrants. The outbreak of the war found among the citizen body of the United States many millions of unnaturalized foreigners upon whose

allegiance the United States had no legal claim. Many more persons of foreign birth had been naturalized during a longer or shorter number of years, but had never been won over to a feeling of affection for the institutions of the country or to a sense of the obligations of citizenship. The presence of a large number of these persons in the training camps and the high percentage of illiteracy among them drew public attention to the urgent necessity of taking steps to bring the foreign-born population, numbering some thirteen millions, into closer touch with American ideals and American political institutions. In consequence the Council of National Defense announced in December, 1917, a national program of Americanization, and called upon the state Councils of Defense to assist in putting it into effect. The States were urged to pass legislation requiring the attendance of non-English-speaking and illiterate persons between sixteen and twenty-one years of age at some school or other educational agency under public supervision. Communities in which there was a large proportion of immigrants were urged to establish factory classes and night schools for their education, and stress was laid upon the training of special teachers and the coordination of immigrant education under a state supervisor. In response to this appeal a large number of the States organized state committees on Americanization and prepared elaborate programs of educational facilities to be offered. New York established a teachers' training institute and formulated plans for instruction in industrial plants. California was not content to carry on the work of education in the schools, but by the passage of a Home Teacher Act provided for bringing instruction in English and civics, sanitation and other subjects into the homes of the immigrants. Arizona passed a law providing that in any school district where fifteen or more persons resided who were unable to read, write, or speak English and who wished to attend night school, the board of trustees should establish such a school, in which not only the language but "American ideals and an understanding of American institutions" should

be taught. In April, 1918, an Americanization conference was held in Washington which was attended by governors and their representatives from twenty-two States, together with other state officers and educators. Legislation was recommended providing for a national program of Americanization, and a committee was appointed to urge Congress to take action.¹

State espionage and sedition laws. The Espionage Act and its amendment, the Sedition Act, passed by Congress in June, 1917, and in May, 1918, attempted, as we have seen, first to prevent interference with the draft law, and secondly to check utterances or publications of a treasonable or seditious character. These measures were supplemented in a number of the States by special legislation looking to the enforcement of the federal law, whether by making the same act an offense against state law as well, or by extending the scope of the prohibition so as to cover conditions peculiar to the individual state. Illinois and Minnesota, for example, made it a misdemeanor to interfere with or discourage men from enlisting in the military or naval service of the United States. Wisconsin and New Jersey penalized the act of advising any person in the State who was of military age not to enlist. Iowa made it a felony to excite sedition or insurrection or to advocate the subversion or destruction of the Federal or state Government by force, and made it a misdemeanor to be a member of or to attend a meeting or council of any treasonable organization, society or order. New Jersey made similar conduct a "high misdemeanor." Texas punished the uttering or publishing of seditious language, which was defined as that

¹ See the "American Year Book," 1918, p. 797-799. The subject is treated in detail in the volume on "The War and the Alien" in the present series.

On January 16, 1920, the Senate began discussion of the Kenyon Americanization bill, the object of which is to combat radical ideas by means of education instead of repression. The bill proposes to enlist the cooperation of the States with the Federal Government by teaching English to immigrants and by giving them a knowledge of the spirit and purpose of American institutions.

which was disloyal, abusive, or calculated to bring into disrepute the United States, its military forces or flag, or its entry or continuance in the war. Abuse of the flag was penalized in a number of the States, in some instances by the enactment of new laws and in others by the amendment of existing laws.

Laws to assist in controlling enemy sympathizers. A number of the States undertook to pass special legislation looking to assist the Federal Government in keeping a closer control over enemy aliens and others whose sympathies might be on the side of the enemy. Iowa, New York, Connecticut, Florida, Maine, and other States supplemented the federal registration law by requiring enemy aliens to register upon notice by the governor and requiring hotels and boarding houses to report alien guests and subsequent arrivals and departures of aliens. A Massachusetts "True Name" hotel law, not aimed directly against the alien, but doubtless having the alien chiefly in mind, provided that landlords of hotels and lodging houses must keep a register in which every person who rented a room must write his true name and place of residence and the true name and residence of every other occupant of the room; both landlord and occupant being subject to a fine for failure to comply with the law. Vermont penalized heavily the possession of military maps and plans, the furnishing of military information and the injuring of public property, providing that if the offense were committed under circumstances amounting to treason, the punishment should be for the latter crime. Minnesota prohibited enemy aliens from having firearms, explosives or the ingredients of explosives in their possession, or to hunt, capture, or kill any game except in self-defense. Maine enacted special regulations concerning the storing and sale of dynamite, powder, and other explosives. New York authorized the attorney-general to conduct secret investigations to ascertain the loyalty of persons under suspicion, and at the same time authorized the governor to suspend the right to fish, boat, or cut ice on any lake, reservoir, or other lands

or waters owned or controlled by the city of New York. Illinois, Maine, Maryland, Rhode Island, Vermont and other States enacted criminal legislation covering the act of destroying or molesting munition plants, armories, gas, electric, telegraph and telephone plants, sources of food or water supply, bridges, railways, and other works necessary to the successful prosecution of the war.

Laws directed against syndicalists and other radical groups. Special legislation was passed in a number of the states to place a check upon the activities of members of the I. W. W. and other radical organizations, whose political and economic doctrines led them not only to oppose the war, irrespective of their nationality, but to adopt means of the most subtle character to hinder its prosecution. Sabotage has long been one of the recognized means by which these organizations have sought to obstruct and ultimately overthrow the existing private ownership of the instruments of production. The favorable conditions created by the war for the practice of this form of "direct action" made it necessary for the States in which these radical groups were numerous to take steps to thwart their secret methods. Several of the northwestern States defined criminal syndicalism as the doctrine advocating sabotage, crime, violence or terrorism as a means of accomplishing industrial reform, Idaho specially mentioning the act of placing or inserting rocks or metallic substances in saw logs. Montana penalized the owner of a building who knowingly permitted a criminal syndicalist meeting to be held upon the premises. North Dakota defined "sabotage in the first degree" as including setting on fire food for man or beast or buildings where food was stored or poisoning work or food producing animals in order to hinder the owner's food producing operations. "Sabotage in the second degree," to which a lesser penalty was attached, included the attempt to commit sabotage in the first degree, as well as the hindering of harvesting or threshing crops by injury to machinery by placing foreign substances in the grain to be harvested or threshed. South

Dakota specified the criminal use of any liquid, chemical, mechanical apparatus, current or other device in the destruction or attempt to destroy life or property.¹

State Councils of Defense. Owing to the subordinate part played by the States in the prosecution of the war it was not found necessary to introduce any important changes into the organization of their governments. There were no "war powers" to be assumed by the state governors, and no such burdens were thrown upon them as to require the passage of state legislation similar to the provisions of the Overman Act. One important modification was, however, introduced into the organization of the state governments by the creation of the State Councils of Defense. Upon the outbreak of the war the Council of National Defense, which, as we have seen, had been created by Congress to coordinate the industries and resources of the country for the national defense, established a department to coordinate the defense activities of the several States. This department subsequently developed into the Section on Cooperation with States. The aim of this body was to act as a clearing house in which the appeal for guidance from the various associations engaged in war work in the States could be met by the suggestion of a uniform general policy, while preserving the principle of decentralization in the actual duties performed. On April 9, 1917, the Secretary of War issued a request to the state governors that state councils should be created to cooperate with the national council in Washington. Some weeks later, at the invitation of the chairman of the national council, a conference of the States, consisting of governors and representatives appointed by them, met in Washington to draw up plans of coordination between the central body and the separate state units. Two months later every

¹ As in the case of the federal Espionage and Sedition laws the aftermath of this war-time legislation has been the proposal of a number of bills directed towards suppressing the advocacy of radical methods of bringing about a change in the Government. The most conspicuous of these measures have been the Lusk bills, passed by the New York legislature, but vetoed by the Governor.

State had organized its own council of defense. At the same time the process of administrative decentralization was carried still further by the creation in each State of county councils with subordinate municipal and community councils. The smallest unit of the system, the community council, was the community itself organized for service in local areas such as the school district or in some States, the township. These local councils became the final link between the Federal Government and the individual citizen.

Composition and powers of the state councils. In a number of States where the state legislatures were in session, the state councils were established by a formal legislative act, and appropriations were made to enable them to carry on the activities mapped out for them. In other cases the councils were established by decree of the state governor and became personal agencies attached to the executive department. In the number of their members the councils varied from half a dozen to more than a hundred appointees. In some cases they were composed, like the Council of National Defense, of ex-officio state officers with the governor as chairman; but more often their membership was drawn from among the prominent business and professional men of the State, who served without pay and without definite tenure of office. Their powers, while of the same general character in the different States, varied widely in extent. Most of the councils were limited to advisory functions. They were called upon, as in the case of the California council, to make investigations into the effect of the war upon the civil and economic life of the people, to recommend to the governor measures to provide for the public security, the protection of the public health, and the development of the economic resources of the State. But in a smaller number of the States the councils were given extremely wide powers, extending in West Virginia to the regulation of mines, factories and railroads, the fixing of prices, and the suppression of disorder; in Wisconsin to the control of food and fuel supplies; and in Minnesota to the protection of

life, liberty, and property, by the adoption of broad measures not inconsistent with the law.

Work of the State Councils Section of the Council of National Defense. The policy pursued by the State Councils Section (formerly the Section on Cooperation with States) of the Council of National Defense was to transmit to the state councils requests for assistance in various matters, leaving it to each state council to develop the means of providing this assistance in the light of its intimate knowledge of local conditions. Requests for direction and offers of assistance from any individual or association within the State were referred by the central body to the state council. Moreover, the central body endeavored to have the departments and war administrations of the Federal Government conduct through the state councils of defense all activities in the several States suited to the decentralized character of the state council system. At the same time the State Councils Section acted as an informal supervising agency to correlate the activities of the state councils and to take the initiative in mapping out new lines of work. Through its directive influence many valuable suggestions bearing upon all phases of war work, such as the care of the dependents of men in military service, the conservation of food, the maintenance of proper labor standards, and the treatment of foreign-born citizens, were transmitted to every part of the country, and it was thus possible to carry out effectively national policies with the aid of local machinery. On the whole the work of the state councils of defense, under the guidance of a centralizing body, furnishes an admirable example of the possibility of attaining in time of great emergency that cooperation between the States and the National Government the lack of which has been one of the weakest features of American Federal Government. Whether it is possible to secure a similar cooperation in time of peace for other objects in which national unity is desirable without sacrifice of local autonomy is a problem for the present age of reconstruction.

Conferences of State Governors. In connection with the

necessity created by the war of securing a fuller measure of cooperation between the separate States and the Federal Government, attention must be called to an institution already in existence known as the "Governors' Conference." In 1908 President Roosevelt called a Conference of Governors at the White House in the interest of securing their cooperation in the conservation of the national resources of the country. This meeting proved to be a first step in the organization of a permanent institution which promised to have important effects in the development of closer relations between the separate state governments. Provision was made for the call of periodic meetings, and a second conference met in Washington in 1910. Thereafter annual conferences met to discuss what might be called local matters of general interest to all the states individually, in contradistinction to the national matters of interest to the people collectively, which fall, subject to the limitations of the Constitution, within the jurisdiction of the Federal Government. The Governors' Conferences, however, disappointed the promise of their formation, and failed to meet adequately the need of that more immediate bond of unity between the States than was created by the Federal Government.¹ On the outbreak of the war several special conferences of the state governors were called. Governors of the New England States met at Boston, and those of the Middle Atlantic States met at Philadelphia, to devise plans for putting their States upon a war footing. Governors of the coal-producing States met at Chicago to consider ways of meeting the shortage of the coal supply. At the same time a special conference of the States was called to which every State in the Union sent representatives, among whom were a number of state governors. The

¹ This failure has been set down "partly to the short terms of most governors and the consequent changing of membership of the Conference and lack of sustained interest in the proceedings, partly to the social and unbusiness-like character of the poorly attended meetings, but more particularly to the lack of the proper sort of a permanent and efficient organization." J. M. Mathews, "Principles of American State Administration," p. 132.

part played by this conference in the organization of state councils of defense has already been referred to. Because of the plans drawn up at these special conferences, and particularly because of the bond of unity created by the formation of the state councils of defense, it was thought unnecessary to hold the annual conference in 1917; but in December, 1918, the conference again assembled and devoted its sessions to problems of reconstruction, while a special conference was called in March, 1919, at the invitation of the Secretary of Labor, at which the special problem of restoring the labor conditions of the country to a normal basis was considered.

Duplication of effort by Federal and state governments.

It will be observed that while some of the laws passed by the separate state legislatures helpfully supplemented the federal laws upon the same subject, many of them were mere duplications of the federal laws and accomplished no other purpose than to place the administrative machinery of the State in motion for the enforcement of the federal law in cases where the federal agents might have been unable to cover the ground. The question may perhaps be raised whether greater efficiency would not have been secured, and the large expenditures of the States and the consequent burden of taxation would not have been spared, had the Federal Government been able to assume complete control of the situation and had the state governments forbore passing war legislation of any kind. As a theoretical proposition the question may be answered in the affirmative; but considering that there were practical as well as constitutional obstacles to any such centralization of authority, some compensations were to be found in the existing conditions. In the first place there is no doubt that the state governments were in a better position to meet the conditions of their particular section of the country than the Federal Government would have been able to meet them by the enactment of general laws binding all parts of the country alike. Again, it is possible that the enactment of state laws, even though closely duplicating the federal laws, reconciled the population of the States to

the conditions imposed far more readily than would have been the case had the federal law alone been in force. The strong tradition still persisting in the United States in favor of the rights of local state government was more easily overcome by the enactment of local legislation paralleling the federal law, even where the latter would have been sufficient of itself to accomplish its purpose.

It is equally beside the point to inquire whether a more efficient administration of the law might have been secured had it been entrusted to officials appointed by and legally responsible to the Federal Government. For practical purposes there was no other recourse for the Federal Government than to fall back upon the state administrative agencies already in existence and to create in cooperation with the state governors such new agencies as were needed. But even had it been possible for the Federal Government to build up an administrative machinery of its own for the enforcement of its new laws, the presence of so many federal agents in the several States might have tended to encourage resistance rather than obedience to the law. The administration of the Selective Service Act through the agency of local boards appointed by the state governors is a striking recognition of this fact on the part of the Federal Government.¹ One may admit, therefore, the loss of efficiency due to duplication of effort in respect both to legislation and to administration and yet, considering the circumstances, hold that such duplication furnished in many cases the readiest means of putting the governmental machinery of the States in motion for the enforcement, if not in all cases of the actual provisions of the federal law, at least of its general objects. A Federal Government which seeks to reconcile the opposing ideals of national unity and of local autonomy must pay the price in the size of its administrative officialdom and in the enhanced cost of the functions it performs.

¹ See above, pp. 211-213.

PART IV

PROBLEMS OF RECONSTRUCTION IN THE UNITED
STATES RAISED BY THE WAR

CHAPTER X

NEW IDEALS OF DEMOCRACY

General effect of the war upon political institutions. With the signing of the armistice and the gradual slowing down of the war machinery of the separate States, the reaction anticipated by all observers began to set in. A year has since elapsed and we are as yet only beginning to realize how far-reaching have been the effects of the war not merely upon the structure and functions of our political institutions, but upon the fundamental principles underlying them. Victors and vanquished alike have felt the force of new disruptive movements. While the polyglot Austro-Hungarian empire has disintegrated into its component parts, and Russia has gone through an even more severe ordeal of civil war, the other nations have not escaped the effects of the great political earthquake. After a brief period of revolution following her transformation from an empire into a republic, Germany returned to a degree of political stability that is threatened for the time being only by the economic burdens imposed upon her by the treaty of peace. Humiliation at the hands of a common enemy has had its historic effect in mitigating the sharpness of class hostility and in drawing the parts of the empire within the circle of a common sympathy. Domestic problems of readjustment are, therefore, for the moment subordinated in Germany to the great international problem of self-preservation.¹ On the other hand, Great Britain, France, Italy, and the United States are still feeling the strain of the war, and are being

¹ The abortive revolution of the Pan-Germanists against the Social-Democratic Government, which has just taken place, is the first manifestation of domestic division, although even here it is possible that the terms of the peace treaty are an underlying cause.

nrged on under varying degrees of pressure to alter their economic system and with it, to a greater or less degree, the machinery of their political organization. In Great Britain and the United States domestic problems loom larger upon the horizon owing to the greater security of their international position; but the same issues of internal reconstruction will press in varying degrees upon France and Italy as soon as the more important demands of their foreign policy have been settled. What will be the ultimate indirect, but none the less real, effect of the war upon our existing political institutions must be for the historian of the future to determine. For the present we can only survey the changes that have taken place which promise to have constructive effects, and make a tentative effort to mark out the lines of probable development in the immediate future.

The principle of self-determination. During the first two years of the war the moral forces of public opinion in neutral countries were directed chiefly to the question of placing responsibility for the catastrophe. Then in December, 1916, public opinion veered to the problem of formulating the terms of a just settlement of the conflict. A month later, on January 22, 1917, President Wilson presented to the Senate a statement of the constructive conditions upon which he considered it possible that the United States might cooperate with the nations of the world in establishing an international league to guarantee peace. Among these conditions was the principle that "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property." Here we have the right of the self-determination of national groups set forth as an abstract principle in terms borrowed directly from the American Declaration of Independence. A year later, on January 8, 1918, when the United States was itself a belligerent, the same principle was reiterated in more definite form as

applying specifically to the subject nationalities of the enemy powers. Among these subject nationalities the idea worked as a ferment of revolt, and long before the armistice was signed revolutionary committees had been formed by them in the countries of the Allies to give effect to the program of liberation. In their turn the countries of the Allied powers reacted to the appeal for the release of national groups from the yoke of the oppressor. In the United States in particular the response was earnest and insistent, and the principle which had served to justify its own revolution became the justification and the inspiration of its forces in their first war upon the soil of Europe.¹

Its connection with the ideal of democracy. It was but natural that the right of self-determination of nationalities should have its effect upon the ideals of democracy within the boundaries of the newly emancipated States. For the same theory of liberty which underlies the claim of national groups as

¹ It is difficult to determine how far the right of the self-determination of national groups can be said to have become an accepted principle of international relations. At the peace conference at Paris the principle was applied only to the subject nationalities of the enemy powers. It is clear that the application of the principle is still conditioned by the political development of the subject group and by the promise which it gives of being able to maintain a stable existence as an independent state. The United States, for example, has promised self-government to the Philippine Islands when they have given proof of their ability to govern themselves; while Great Britain considers Egypt and India to be ready only for a similar probationary degree of self-government. Moreover, the principle is conditioned by the political relations between the dominant state and the subject community, and here no general rule can be laid down. Great Britain denies independence to Ireland partly on the ground of alleged danger to her own safety from the presence of an unfriendly state at her ocean gates. Porto Rico's independence would in the eyes of the United States be uncalled for by the insignificant size of her political group. Whether the decision of the dominant state be just or unjust in these cases, it is clear that the right of self-determination has not yet been accepted by international law except in the most general terms.

a unit to choose their governments and determine their destiny underlies the claim of individual members of each national group to have a voice in determining the character of their particular governments and the economic and social policies which those governments are to pursue. When the Czechoslovak National Council, acting in the character of a Provisional Government, drew up its Declaration of Independence in Paris on October 8, 1918, it first recited at length the history of its grievances against the Hapsburg dynasty and repudiated the claim of that dynasty to rule against the will of the Czechoslovak people. It then set forth the ideals of its own domestic government, in which the principle of the freedom of nationalities took shape as the freedom of the individual citizen against special privileges and class legislation. Freedom of conscience, of speech, and of the press, and the right of assembly and of petition were guaranteed. Universal suffrage was granted, the rights of minorities were safeguarded by proportional representation, and the lesser national groups within the republic were assured equal rights. Again, when the Mid-European Union of the newly liberated nations extending from the Baltic to the Adriatic was created on October 26, 1918, in Independence Hall, Philadelphia, the assertion of the "inalienable right of every people to organize their own government" was followed by a statement of the wrongs which had been suffered at the hands of their former governments in respect to the fundamental rights of citizenship, and the signers of the Declaration pledged themselves that the principles therein set forth should be "incorporated in the organic laws" of whatever governments their respective peoples might thereafter establish. Thus freedom of citizenship within the State became associated with freedom of the State as a whole, and it was recognized that the right of a group to demand its emancipation from alien control necessarily carried with it the obligation to respect certain fundamental rights which the citizen might claim against the group itself.

The appeal to democratic ideals during the war. At the

same time that the new nations were affirming their belief in the principles of democracy as a natural concomitant of their assertion of the principle of self-determination, the United States, which had long since given its adherence to those principles in the abstract, was confronted with new problems bearing upon their interpretation and application. On every side appeals were made by the Government to the citizen body and by the leading organs of public opinion to their circle of readers to rally to the support of the moral issues that were at stake in the war. In Great Britain and France, where the call of self-defense was clear and unmistakable, the appeal to ideals was naturally less persistent than in the United States, whose people found it difficult by reason of their isolated position to realize the menace of a foreign foe. Moreover the traditional foreign policy of the United States had been such as to make the proposal of a war in Europe one which required a far more convincing justification on moral grounds. The educational propaganda carried on by the Committee on Public Information was but a small part of the general program of appeal from platform, pulpit, and press, seeking to clarify the issues of the conflict and to show how intimately the ideal of democracy which had dominated the United States since the days of the Revolution was bound up with the defeat of the armies of the Central Powers. That "the world must be made safe for democracy" became the battle cry of America. The call from the President was to fight "for the ultimate peace of the world and for the liberation of its peoples, the German peoples included: for the right of nations great and small and the privilege of men everywhere to choose their way of life and of obedience."

Application of the ideal to domestic conditions. It was inevitable that this nation-wide appeal to patriotism and high ideals should awaken deeper moral forces than such as could be satisfied with a mere triumph of armies over the enemy. Once the seeds of a new faith have been sown broadcast and have taken deep root in the popular mind, the plant cannot

be arrested until it has attained its full development. The motives which aroused the citizen body to resist oppression from without were equally valid against oppression from within the State. In consequence, there came throughout the country a time of searching of hearts and men began to ask themselves whether the democracy for which the world was to be made safe had, in truth, been realized in the domestic institutions and policies of the nations upon whose military banners it was so prominently inscribed. Could it indeed be said that the existing laws of the State corresponded with that ideal of democracy which was the antithesis of all that absolutism stood for? The very vagueness of the ideal made the critical inquiry as to its actual realization the more far-reaching and the more difficult to satisfy. Democracy had become, as it were, synonymous with freedom and justice, and the searchlight of an alert public conscience was turned into the darker corners of public life where old abuses had hitherto remained more or less hidden from sight. This introspective process became all the more insistent after the signing of the armistice. The early and unexpected victory of democracy over the enemy from without its gates broke upon the public mind before the energies concentrated for that object had been half expended. In a moment of illusion men saw the world of nations remade and a new order of freedom and justice take the place of the outworn international institutions which had failed to prevent the great catastrophe. Was it too fantastic to hope that outworn domestic institutions might in like manner give place to a new political system worthy of the lofty visions that had taken possession of the popular mind? The question was asked by one and all to whom existing conditions had not met the measure of their aspirations. The result was that a deep and widespread spirit of unrest began to be manifested, even in those countries in which the elements to unrest had hitherto been regarded as constituting a negligible proportion of the community at large. Not only were existing political institutions the object of criticism and distrust, but it came to be questioned

by many whether the whole purpose and aim of the State itself had not been perverted from its primary object of securing liberty and justice to one and all and had been concentrated upon the protection of the special interests of a privileged few.

The demand for industrial democracy. The causes of this spirit of unrest, which in the year that has elapsed since the signing of the armistice has increased rather than abated in extent, lie in the domestic conditions of the different countries and to that extent they are a primary concern of the sociologist and the economist. But in so far as these conditions demand for their cure the creation of a new political organization or, at least extensive adjustments of the existing political machinery, they become a problem of equal importance to the statesman.¹ In the United States the problem is partly based upon the revolt of the worker against the domination of capitalistic control of industry, after the manner of the revolt of national groups against the domination of an alien government; and again partly based upon the demand of large masses of the population for a fuller share in the wealth of the country than has been assigned them by the processes of industrial competition. On the one hand it is asked, why fight a war to

¹ Politics, economics and sociology have, indeed, ceased to be divided by any clear line of demarcation and have come to deal in large part with the same subject-material, but from their own distinct points of view. The sociologist concentrates upon the human instincts and motives which bring men together in groups, the economist concentrates upon external conditions which govern the struggle of these groups to provide for their material welfare, while the political scientist or statesman concentrates upon the governmental organization demanded to maintain law and order in the development of these social and economical relationships. The more complex social and economic life becomes, the more complex is the political organization required to meet the demands of law and order, and in turn the existence of the political organization reacts upon the social and economic relationships which called for its creation. Henceforth, more than ever, workers in the three fields of science must be continually in consultation with one another.

make the world safe for a political democracy which has such obvious limitations in the satisfaction of the desire for freedom? Of what advantage is it to cast a ballot for the officers of the State when by far the larger part of the life of the average worker is spent under conditions of employment dictated by industrial officers whom he is powerless to control? Why speak of a legal freedom of contract when for all practical purposes the pressure of economic necessity forces the worker to accept the best bargain he can make? The assumption underlying both the federal and the early state constitutions at the time of their adoption was that political liberty was the primary object of government; but this assumption has proved to be completely inadequate in the presence of modern industrial conditions which have fundamentally altered the relation of the individual citizen to the community. The demand is, therefore, being made that political democracy be supplemented by industrial democracy, and that the principle of self-government with its connotations of self-imposed restraints and self-determined policies shall be applied to the industrial community in much the same way in which it is applied to the same group of persons in their capacity of citizens of the State.

Forms of industrial democracy. Stated thus in the more abstract terms of theoretical democracy the phrase "industrial democracy" is sufficiently intelligible, but when applied as a practical rule to the concrete facts of industrial life its forms are as diversified as are the forms which the theory of political democracy has taken when converted into a working agency of government. As the phrase is now popularly used, it describes a reorganization of industry in which the workers shall be given a share in the management of the particular establishment in which they work, and shall become co-partners instead of servants in industrial enterprise, just as the citizen body at large without respect to property or social position have become co-partners in the creation and direction of the agencies of government. The practical applications of industrial democracy vary all the way from a limited demand

of the workers to organize and elect representatives, through whom they may voice their interests and grievances, to the extreme form of complete control of the organization and policies of the establishment. In its more moderate forms it is already in operation in numerous industries in Great Britain in the form of the "Works' Committees" recommended in the Whitley Report.¹ These committees represent both the employers and the workers and have a wide range of functions including questions of discipline in the workshop, the settlement of the general principles governing the conditions of employment and the payment of wages, the adjustment of disputes between the employers and the workers, provision for industrial education, and the readjustment of the seasonal fluctuations of industry so as to secure greater stability of employment. Similar committees, though possessing less comprehensive functions, are now being introduced into isolated industries in the United States, and indications point to the rapid growth of the movement here as well as in Great Britain. A conservative statement of industrial democracy, as understood by the American Federation of Labor, may be found in the "Reconstruction Program" prepared by the Committee on Reconstruction created by the annual convention of 1918, and endorsed by the Executive Council. Under the subheading of "Democracy in Industry" the program compares the law of the State with the rules of industry and points out that whereas the methods of democracy prevail in the enactment of legislation, the rules of industry are created, except where effective trade unionism exists, by the arbitrary whim of the employers. "Both forms of law," it is said, "vitally affect the workers' opportunities in life and determine their standard of living. The rules, regulations and conditions within industry in many instances affect them more than legislative enactments. It is, therefore, essential that the workers should have a voice in determining the laws within industry and commerce which affect them, equivalent to the voice which they have as citizens in de-

¹ See above, p. 98.

termining the legislative enactments which shall govern them." The form of industrial democracy proposed by the Federation, however, consists merely in the recognition by the employer of the "right to organize into trade unions" and no machinery, such as joint industrial councils, is offered to supplement the present negotiations between the several labor unions and the employer.

Proposals of the Industrial Conference. Perhaps the best expression of progressive public opinion on the subject of industrial democracy is to be found in the report of the Industrial Conference which met in Washington on December 1, 1919, at the call of the President. The calling of the Conference had been precipitated by the failure of an earlier National Industrial Conference, which had met in Washington on October 6, 1919, to find a solution for the prevailing industrial unrest. This first conference proved ineffectual owing to its inability to come to an agreement upon the principle of collective bargaining.¹ The second Conference from the outset declared itself "in favor of the policy of collective bargaining" and drew up its proposals for the settlement of industrial disputes upon the frank acceptance of that principle. Omitting from consideration the elaborate machinery of national and regional boards for the settlement of industrial disputes which the Conference recommended, attention may be called to its proposal of a system of "employee representation" within each industrial plant as the chief means of preventing industrial disputes from arising. Obstacles were confronted in the unwillingness on the part of employers to deal with officials of the American Federation of Labor or other

¹ A majority of the Conference as a whole had favored the recognition of the principle of collective bargaining, but a form of procedure had been adopted by the Conference which provided that no resolution could become effective unless agreed to by the votes of all of the three groups, representing employers, employees, and the public, into which the Conference was divided. The employers' group voted by a majority against recognition of the principle, and thus prevented its acceptance by the Conference.

federated union leaders, as not being truly representative of their employees, and in the fear on the part of union leaders lest shop representation prove to be a subtle weapon directed against the unions. A reconciliation had to be effected, therefore, between the organization of labor by trades and the organization of labor within each industry as a unit. The Conference found that the relation between the two was "a complementary, and not a mutually exclusive one," and that in many plants the trade union and the shop committee were already functioning harmoniously, and that there were distinct functions to be performed by each organization. "Joint organization through employee representation" was thus the proposal which the Conference offered as "a means of preventing misunderstanding and of securing cooperative effort." Employers and employees were to meet together regularly to deal with their common interests. The Conference recognized the existence of conflicting interests between employers and employees, but believed that there were "wide areas of activity in which their interests coincide," and that it was "the part of statesmanship to organize identity of interest where it exists in order to reduce the area of conflict." "The representative principle is needed," it said, "to make effective the employee's interest in production, as well as in wages and working conditions. It is likewise needed to make more effective the employer's interest in the human element of industry."¹

Radical phases of industrial democracy. The demand for the more extreme forms of industrial democracy approximates more or less closely to the program of the Syndicalists, and amounts to the complete management of industry by self-gov-

¹ The reader may make comparisons with the "works' committees" in Great Britain proposed by the Whitley report (see above, p. 98), and with the "workers' councils" created by the new German Constitution (see above p. 57).

² It is expressed graphically in the statement of the leader of the British workers in the shipyards along the Clyde, who in answer to

erning industrial groups.² This form of industrial reconstruction, or rather revolution in some of its aspects, received a marked impulse as a reaction against the temporary control exercised by the British and American Governments over industry during the war. The ideal of a Socialist State which should own and operate the principal instruments of production and distribution had always included as an essential condition that the State itself should be under the control of the workers. The experience of the war, however, made it clear to many Socialists that there was ever probability that further extensions of government ownership under existing conditions might result merely in a change of masters; and no advantage was found in exchanging the individual capitalist for a government controlled by capitalists. Even before the war a group of Guild Socialists in England had pointed out this danger, and had planned to offset it by a system of decentralized labor control. The basic unit proposed by these writers is an industrial union as opposed to a craft union, for which unit they have revived the name of "guild." These local guilds are to be federated into a national guild, which is to have its Guild Congress meeting side by side and in cooperation with Parliament.¹ In France the Syndicalist organization, an older body than the Guild Socialists, is based upon a union of two federations, that the question of an employer as to what was still wanted after successive increases in wages had been made, replied, "We want the works."

¹ It has been pointed out above (p. 96) that there is a sharp division in the labor movement in Great Britain between those who favor the nationalization of the great industries and those who are opposed to conferring such powers upon the state as at present organized. The Labor party has put forth a definite program for the "socialization" of the great industrial agencies which control the necessities of life, and at the same time it is pressing an even more radical demand in the shape of the socialization of wealth already created and concentrated in the hands of a small number of capitalists. The strength of the party makes its program significant, but there are influential voices in protest against what is considered a dangerous enlargement of the sphere of state control.

of the local trade unions, and that of the local *bourses* which represent all the labor elements of the community. Like the Guild Socialists, the Syndicalists advocate self-governing industrial groups and are opposed to Socialism and collective ownership; but they differ from the Guild Socialists in advocating "direct action," in the form of sabotage and the general strike, as a means of attaining their objects. In the United States the Industrial Workers of the World, better known as the I. W. W., are in respect to their methods of direct action more radical even than the French Syndicalists and less definite in their aims, but with them also it is the local self-governing industrial group that forms the basis of their industrial program.¹

Necessity of experimental steps. That the demand for industrial democracy is one which may easily run counter to sound principles of political and economic experience will doubtless be admitted by all except its most extreme advocates. Conceding the necessity of inaugurating a program of co-operation between employers and employees in industrial management, the question becomes one of determining the steps by which it shall be introduced and the restrictions with which

¹ It is important, in view of the indiscriminate use in the public press of the terms Socialist, Syndicalist, Anarchist, Bolshevik, and "Red," to distinguish between their respective attitudes towards industrial democracy. Judging them by their aims rather than their methods, they may be roughly classified as follows: the Socialist (of the orthodox Marxian type) makes collective or state ownership the basis of his reforms; the Syndicalist looks to self-governing industrial groups as the unit of organization with federation as the means of adjusting their conflicting interests; the Anarchist (of the philosophic type, like Kropotkin) relies upon similar self-governing industrial groups, with the government of the state eliminated; the Bolshevik combines Marxian Socialism, in the collective ownership of land and industry, with a measure of Syndicalism in the organization of the state by soviets; while the "Red" may fall into any one of the four groups, being distinguished by the methods of violence which he advocates to secure his aims rather than by the character of the aims themselves.

it must be surrounded during its initial stages. The inevitable tendency of the most moderate forms of industrial democracy must be to push on until in due time complete control over industry is obtained in respect to profits as well as to management. Whether the latter stage is to be the ultimate and ideal goal of industrial development is still a matter of theoretical discussion. But it would seem clear that, apart from any question of the confiscation of property, the universal and abrupt introduction of the syndicalist program of self-governing industrial groups, before a sense of collective responsibility and enlightened self-interest on the part of the workers has been developed and before the complex relations between the individual industry and industries as a whole have been carefully worked out, is one which may well give pause to all who have the experience of political development before their eyes. Political democracy has not attained its success except at the price of a degree of inefficiency and disorganization which would have sent the average industrial establishment into bankruptcy. In so far as the economic life of the community is more complex than its political life and contains greater possibilities of disastrous mismanagement, there will be the greater danger of the presence of that partisanship which is the besetting sin of politics. Industrial groups may become as keen rivals as individual employers, with the probability of less control over them by the State as a whole. Within the industries themselves unity of command in the organization and directive ability will continue to be essential conditions of efficient production, and the advantages claimed for democratic control must be balanced against the probability of serious losses from these two sources. If industrial democracy is entered upon in any thorough-going way, therefore, it must be prepared to pay some price in decreased production. At the same time it must be ready to impose upon itself restraints similar to those imposed upon itself by political democracy; so that neither the organization of industry as a whole nor any part of it shall attempt to dictate policies except in

accordance with the fundamental principles of an industrial constitution.¹

Democracy and the distribution of wealth. Just as it is important that industrial democracy shall recognize the value of experience in political self-government, so it is important that the lessons of economic experience shall be borne in mind when the demand is pressed that the machinery of the State shall be used for the purpose of securing a more equitable division of the national wealth. Here again the circumstances under which the war was fought gave a new pertinence to an old grievance. The appeal made by the Government to the patriotism of the individual citizen, the sudden importance attached to mere manual labor as essential to the production of the necessary materials of war, and in particular the leveling of class distinctions in the operation of the Selective Service Act, all seemed to point to a fundamental equality in human relationships which made the actual inequalities of social and economic status seem strangely inconsistent. If the State could call upon one and all of its citizens to make the supreme sacrifice or such lesser sacrifices as might be in their power, did not this imply that the State had on its part conferred such blessings upon its citizens as to justify the demands made upon them? Yet the wide disparity in the possession of the material goods of life seemed to contradict any such assumption. Many who had no particular sympathy with the doctrines of orthodox Socialism, either in respect to ownership by the State of the instruments of production and distribution, or in respect to a rigid wage system based upon abstract principles, nevertheless came to believe that the actual distribution of property

¹ The economic aspects of the question are, of course, manifold, but they are outside the scope of the present discussion. Perhaps the most consistent attempt to work out a plan of industrial democracy along lines approved by political experience is to be found in the program of Guild Socialism, or, as the movement is now better described, National Guilds. See A. R. Orage, ed., "National Guilds"; G. H. D. Cole, "The World of Labour."

did not represent an apportionment based upon natural economic laws, but was rather the result of artificial restraints upon the free play of human energies. The result was that a new force was given to the conception of democracy which looks upon the State not merely as an agent for the protection of existing rights, but as a direct source of positive benefits and as the dispenser of bounties of its own creation. At the same time what was left of the old traditional jealousy of the interference of the State in the economic life of the citizen practically disappeared before the recognized need of governmental control over the great industries of the country as a means of prosecuting the war more successfully. The problem of the present after-war period is on the one hand to reconcile the need for greater protection of the citizen body against the power of the great corporations controlling the necessities of life, without at the same time destroying the individual initiative in business enterprise which is an essential part of the American tradition of democracy. On the other hand the burden of taxation must be made to fall upon wealth in due proportion to its larger enjoyment of benefits created by the State, yet without discouraging the practice of private thrift, or denying the larger measure of reward which energy and talent must inevitably command if their full powers are to be called forth.

Constructive contribution of the war to democracy. Thus far we have been viewing what may be called the critical contribution of the World War to the problem of democratic government, in so far as the ideas of freedom which it set in motion tended to break through established political boundaries and create a demand for a fuller measure of industrial liberty and a more equal distribution of the national wealth. On the other hand the war had the effect of strengthening in many ways the existing institutions of democracy and of enkindling a new faith in the old ideals. For the first time in its history of 128 years the United States found itself called upon to exert the full measure of its national strength against an external enemy. Demands had to be made by the Govern-

ment upon the citizen body for a degree of cooperation and self-sacrifice which no previous war against a foreign State had ever called forth. The crisis was one in which the vital energies of democratic government were put to a test more severe than it had ever been contemplated by the founders of the republic they might be called upon to endure. In its endeavor to meet that test we have seen what the United States was able to accomplish in respect to the mobilization of its national resources. Only incidental reference was made to the spirit of patriotism animating the response of the people to the demands made upon them. What moral forces this spirit of patriotism aroused and what may be its permanent contribution to the problems of democratic government may here be briefly noticed.

The strengthening of the bond of national unity. It was to be expected that war against a common enemy would result in binding together the citizen body by the creation of one supreme interest which overrode the lesser interests underlying the dissensions of normal political and social life. The mere motive of mutual self-defense against a foreign foe, however, has little in it of permanent political value. History shows that it has often been used by autocratic rulers to bind together rebellious elements of their population, which can be made for the time to forget their domestic grievances before the shadow of invading hostile armies. When, however, that shadow has been removed, whether by victory or by defeat, the internal forces of dissension reassert themselves in their full vigor.¹ What gave a more than temporary unifying power in the United States to the nation-wide call of self-defense was the fact that ideals of political reconstruction were held out to the people by the Government from the very beginning of the struggle. The war was a war in defense of Amer-

¹ At the present moment, after four years of the closest national unity, Germany appears to be in a state of political confusion, in which there are no clear and definite principles of democracy possessed by the people as a whole which can be rallied to the support of the new republican government.

ican rights, but it was also a war for the liberation of territories occupied by the enemy, for the release of subject nationalities from alien rule, for the removal of the barriers of political distrust and economic rivalry which were a standing menace to the peace of the world. In the presence of these ideals the appeal to national unity, it is believed, had a distinct constructive value, however difficult it may be at the present moment of reaction to point out its precise effects. It has left the citizen body of the nation richer in respect to the principles of cooperation and of mutual self-sacrifice for the common good, which are the foundation stones of democratic government. The ideal may be temporarily obscured in the confusion of partisan conflicts, but it still remains as a guiding principle to which all parties can appeal, and it must perforce exercise a strong unifying influence at a time when the power of organized groups is threatening to dominate the community as a whole.

New emphasis upon the duties of citizenship. Among other elements of constructive political idealism created by the war was the clearer conception of the duties of citizenship. It was owing, doubtless, to the peculiar traditions of American development, though the fault is shared in part by other democracies, that an undue importance has been attached in the past to the rights of citizenship as against the corresponding obligations entailed by those rights. The distrust of governments which marked the early history of the United States, and the strong sense of political and economic individualism developed by the opening up of a new country are in part responsible for this attitude. The fundamental "rights" of the citizen were protected by specific constitutional clauses; the fundamental duties were left to be reached by implication. As a matter of practical politics there may be no objection to this method of defining duties, but for educational purposes it is seriously deficient. At the very beginning of the war it was found necessary to determine some of the fundamental obligations of citizenship, including primarily the duty to serve

in the armed forces of the nation, the duty to subordinate the interests of particular industries to the prosecution of the war, to engage in manual labor in essential industries, to submit to the losses involved in price-fixing, to subscribe to government loans, and to make other pecuniary sacrifices. The keynote of the spirit of patriotic duty was struck by President Wilson in his proclamation fixing the day of registration for the Selective Service Act: "The whole nation must be a team in which each man shall play the part for which he is best fitted. To this end Congress has provided that the nation shall be organized for war by selection and that each man shall be classified for service in the place to which it shall best serve the general good to call him." That the sacrifices demanded by the Government were not distributed equally throughout the citizen body was doubtless largely due to the difficulty under any circumstances of framing laws to apportion fairly the burdens of civic duty; but to a considerable extent it should be put down to the failure to anticipate beforehand the comprehensive character of the demands which war would make upon the whole industrial and social life of the nation. But wherever the fault lay in that respect, the appeal during the war to the obligations of citizenship met with a response which surprised even the most hopeful, and one of the chief tasks of the present moment is to conserve the spirit of self-sacrifice thus created and direct it to the problems of reconstruction which are now before the country.

The responsibilities of citizenship. While the war has done much to create a deeper sense of the obligation of the individual citizen towards the State as a whole, it has at the same time tended to strengthen the sense of responsibility which the citizen body of a democracy must feel for the existence among its individual members of those minimum conditions of decent living without which true democratic government is impossible. It is a curious feature of American democracy that a large part of the citizen body has been quite indifferent in the past to conditions of living among a section

of its population which were a standing contradiction to the ideals of democratic government. In a country so rich in natural resources and so far advanced in industrial development as the United States there have existed side by side contrasts of wealth and poverty, of education and of ignorance, which cannot be reconciled with the equality of fundamental rights upon which the Declaration of Independence was based. For the poverty which exists in certain centers of the population is to be regarded not merely in its negative aspect, as consisting in the lack of certain material goods, but as a positive influence in promoting crime and immorality, in increasing disease, in retarding the healthy development of the young, and in creating the spirit of unrest which is popularly described by the name of Bolshevism. At the same time the economic disabilities of poverty have been attended by legal disabilities resulting from an administration of justice which has not taken into account the changing conditions of modern economic and social life.¹ By contrast, however, to its former indifference to these conditions, there are signs of a marked change of attitude on the part of public opinion since the war. The people of the United States could not invest themselves with the rôle of crusaders against foreign aggression without having their eyes opened to similar obligations in respect to conditions of economic oppression at home. At the present moment there is being manifested both in the press and in the activities of civic associations a deeper understanding of the obligations of trusteeship involved in democratic government. While believing that the constitution of the State is fundamentally sound, leaders of public opinion are recognizing that there are in the body politic isolated sore spots which

¹ A recent authoritative investigation of the lower courts of the United States has revealed numerous cases of miscarriage of justice in consequence of long delays and heavy costs which the poorer classes were unable to meet. "Justice and the Poor," a report prepared for the Carnegie Foundation by R. H. Smith, with foreword by Elihu Root.

must be removed before it can enjoy a healthy existence. The task of removing these sore spots is one to which every citizen must lend his aid. There has been far too widespread a tendency within recent years to look to the law to accomplish the necessary reforms in our industrial and social life. It is now beginning to be realized, in the light of the experience gained during the preparations for war, that the administrative machinery of the State, acting in pursuance of general laws, cannot reach many of the conditions which urgently need to be improved. A new understanding of an old idea is gaining ground, that in a democracy each citizen is for certain purposes an office holder, and that voluntary agencies must be created where the law appears to be unable to act. The wide range of activities performed by the great voluntary war associations and their elaborate programs for continued work in the same field give hope that the lessons of the war have created a new conception of civic responsibility.

Voluntary associations as public agents. The work of the Red Cross and other voluntary associations, whether operating in immediate connection with the army or as auxiliary relief agencies in fields of social service created by the war, is sufficiently familiar to be passed over without comment. It is important, however, to emphasize the fact that by means of these agencies the Government was able to unload a large part of administrative work which there was no existing organization to handle. At the same time these voluntary agencies performed an important political rôle, the usefulness of which, it is believed, will be realized only in future years. Theoretically it was possible for the Government to organize its own relief service of paid employees to do the work undertaken by the Red Cross and other privately organized bodies. But not only would the host of governmental officials thus required have made the machinery of government so complex as to have impaired its working efficiency, but their activities would have failed to meet with the same response from the citizen body. A people unaccustomed to governmental interference in their

daily lives would have resented the presence of a large body of paid officials, even though they performed precisely the same functions as were enthusiastically supported when performed by volunteer workers. In the case of the Food Administration the plan was followed of inviting each individual citizen to become a member, and to pledge his or her cooperation with the plans put forth by the Government officials in control. This appeal of the Government to the voluntary aid both of groups and of individuals not only helped to obviate the dangers of bureaucratic control incident to the assumption of extensive powers by the Government, but helped to create a sense of the importance of the individual in democratic government. It has been questioned by statesmen whether democracy is possible in a country whose size is so great that contact between the individual and his representatives must necessarily be lost. The remedy is partly to be found in the continuance and development of voluntary associations operating on principles of free cooperative endeavor to meet recognized local needs.

Rights of the community against organized minorities. The spirit of civic cooperation developed during the war by means of these voluntary associations, as well as the subordination of local and individual interests to the needs of the country as a whole, is finding practical application at the present moment in the controversies that have arisen between capital and organized labor in connection with certain of the great industrial establishments of the country. The issue is presented as a case of the rights of the community as a whole against organized minorities, whether these latter be the owners of industrial plants acting individually or in concert, or the individual or federated trades unions of the employees. On the one hand while the great transportation systems have been brought under the direct control of the Federal Government, the industrial corporations have remained practically uncontrolled except where their combinations have brought them under the laws against monopolies and trusts. The owners of the great steel industries, of the coal, iron, and copper mines,

of the textile and shoe factories, have been allowed to conduct their business with only such regard for the public as the profits of the industry and their individual sense of responsibility might dictate. On the other hand organized labor, acting through local and federated trade unions, has remained in like manner practically free from the control of the State. Industrial disputes resulting in strikes and lockouts have gone on in complete disregard of the community at large. During the period when the owners of industry had the upper hand resistance to proposals for compulsory arbitration came from that quarter; but at the present day when the labor unions are beginning to realize their power, resistance to the control of the State is being manifested on their side as well. In both cases the public at large, as consumer of the products of industry, has stood by in a patient and somewhat stolid mood. This mood is now changing to one of self-assertiveness, and under the inspiration of measures taken by the Government during the war to control both capital and labor the demand is being pressed more insistently that measures of compulsory arbitration be introduced not only in respect to what are known as public service corporations, but in respect to the great industries producing the more immediate necessities of life. Industrial disputes have thus come to be distinctly political problems, to which a solution must be found in the interest of the community at large. Capital and labor cannot be allowed to resort to the methods of private combat to the injury of a dependent public. Unless the welfare of the State as a whole is to be given precedence over that of any group within the State, democratic government will have reached a condition of bankruptcy.¹

Democracy and freedom of speech. The urgent necessity

¹ Illustrative cases may be found in the strikes in the steel mills and in the coal mines in October and November, 1919. The general condemnation of the police strike in Boston in September, 1919, must be explained by the mistaken methods employed by the strikers in disregard of the rights of the community, even in a case where the substance of their claim appears to have been otherwise just.

for cooperation and complete unity of national purpose in time of war raised in an acute form the problem of freedom of speech in a democracy. We have seen the character of the laws passed by Congress and by the state legislatures as distinctly war measures, as well as some of the bills subsequently introduced along the lines of the Federal Sedition Act.¹ These latter measures are a direct outgrowth of the war, and represent an attempt to check the progress of radical doctrines subversive of the American form of constitutional government. They have had the effect of raising the issue whether, by suppressing freedom of speech, a democratic government is not repudiating one of those fundamental principles upon which democracy itself is essentially dependent. By their very nature such laws have to be drawn in more or less general terms, leaving it to the courts to determine their application to the facts of the particular case. That the way is thus opened to an abuse of power can scarcely be denied. Where does criticism of the present agents of government end and criticism of the institutions of government begin? How distinguish practically between an attack upon an existing law as a piece of partisan and unjust legislation and an attack upon the same law in respect to its binding power? These are but instances of the legal difficulties which must be met by the courts; and while it may be conceded that in normal times the courts will be able to draw substantially just distinctions between what is seditious and what is not, the abstract principle of freedom of speech remains in a somewhat precarious position. The old laws against anarchy made a clear distinction between the expression of opinions and the incitement to acts of violence; the new laws seem to be directed against the language itself irrespective of its probable effects. But the mere advocacy of socialism, syndicalism, anarchism, or any other radical scheme of reconstructing society, cannot be prohibited without encroaching upon freedom of speech in its most elemental form. The test must be not the ideal proposed by the revolu-

¹ See above, pp. 170, 218.

tionist, but the means proposed for reaching that ideal. Violence of every kind must be absolutely barred as a method of securing political ends. Under a constitution which provides for majority rule no inferences from the abstract right of revolution¹ can be allowed to sanction a resort to force. The Syndicalist may be permitted to attempt to win over a majority to his program; what he cannot be permitted to do is to incite a minority to seek to accomplish by force what they are unable to accomplish through the ballot. So long as a law is on the statute books it must be obeyed; agitation for repeal is always in order; but until repeal is effected through the forms of law prescribed, resistance and the advocacy of resistance cannot be tolerated if democracy is to survive.

Democratic control of foreign affairs. One of the outstanding results of the war has been the demand for a greater degree of popular control over the administration of the foreign affairs of the country. Whatever is to be said of the long delay in ratifying the treaty of peace with Germany, it is at least clear that the unending discussion of the subject both in Congress and in the public press has done much to educate the people upon questions hitherto largely remote from their thoughts. Partisan interests may be clouding the general issue, and the decision of public opinion at the moment may be biassed in consequence, but the ultimate result must be a marked increase of knowledge as a basis for future action. How soon "open diplomacy" can become a feasible and safe method of conducting the diplomatic relations of the United States with other countries will depend upon the degree to which public opinion is prepared to exercise an enlightened and self-restrained judgment upon the delicate problems which fre-

¹ An exception must be made, of course, in the case of the so-called "conscientious objector" who refuses obedience to a law because it violates moral principles which are to him a higher law than that of the state. Such cases involve, however, a negative attitude of resistance, not a positive attitude of aggression.

quently arise between nations. Popular excitement over questions in dispute with foreign nations has more than once in the history of the United States proved dangerously chauvinistic. It is fundamentally important, therefore, that if democratic control over foreign policies is to prevail, in the sense that all questions at issue between the United States and other nations shall be placed in detail before the public during the negotiations, there must be a wider and more accurate knowledge of the facts and principles involved than has hitherto prevailed. Ignorance not only lends itself to selfish and mistaken conceptions of national advantage, but it has the far more serious weakness of offering no resistance to the appeal of the demagogue to the suspicions and hatreds which are still provoked by the rivalries of the great nations. The hope of international peace rests in the wider application of that rule of law which forms the guiding principle of our national life as a federation of semi-autonomous States. For the time being there are many problems to which it is difficult to apply abstract principles, and which can only be settled by such measures of expediency as the wisest statesmanship can devise. When the citizen body of a democracy has given proof that it can weigh facts dispassionately and forego immediate advantage in favor of the general rule of law, it will be in order for it to take more directly in hand the decision of its foreign policies.¹

¹ For the difficulties attending a national referendum upon such questions, see below, p. 281.

CHAPTER XI

THE PROGRAM OF POLITICAL RECONSTRUCTION

IN the preceding chapters in which the organization of the Federal Government and the extension of its activities to meet the demands of the war were described, no attempt was made to do more than set forth the actual changes introduced into the normal functions of the Government. In like manner the functions performed by the separate state governments were presented merely in their specific character as war measures. But it is clear to all observers that the war did far more than merely bring about certain temporary and expedient changes in the organization of the Government and the scope of its activities, some of which are to be undone as soon as possible after the conclusion of peace. Numerous questions were raised at one time or another during the course of the conflict, and the problem of the reconstruction of our political institutions concerns not merely the retention or the rejection of this or that change actually introduced, but it embraces the further question of the advisability of pushing forward in the direction of repairing the many other weak places in our political machinery which were revealed by the war. Owing to the urgent need of haste and to the stress of other more immediate demands, it was impossible during the war not merely to repair those defects but even so much as to discuss the proper methods of undertaking the task. But with the return of peace the problems presented by those defects are now before us and we may consider them in one sense as a direct heritage of the war. Many of them were, it is true, discussed as measures of reform in the years preceding the war; they have now become urgent measures of reconstruction which the war showed us can no longer wisely be left to academic discussion.

The problem of centralization versus decentralization. The first of the great issues of political reconstruction to which the war has given a new meaning and importance is the question of a more logical division of power between the Federal Government and the separate States.¹ We have seen that the States were called upon during the war to yield to the encroachments upon their authority and jurisdiction involved in the assumption by the Federal Government of the new functions which the demands of the war forced it to undertake. If the past history of the country may be taken as an indication of future action it is not likely that the Federal Government will surrender the full measure of the temporary enlargement of its authority. Step by step during the 130 years of its existence the Federal Government has extended its powers beyond its original confines, still keeping within the letter of its constitutional restrictions, but reaching out to meet new conditions and new emergencies not contemplated at the time of its creation. The most urgent of these new conditions and emergencies were those created by the present war, and under its stress an extension of Federal power not hitherto contemplated by the most ardent federalist was acquiesced in by the States without complaint or protest. It must be observed, however, that not all of the war powers assumed by Congress and the President were an encroachment upon the sphere of action of the States. Many of the new functions represent activities of government which by their very nature, being national in scope, were beyond the control of the individual States, yet which had not been expressly or impliedly delegated to the Federal Government. President Roosevelt once emphasized the fact that the constitutional division between the powers "delegated" to the National Government and those "reserved" to the States had left vacancies and blanks between the prescribed limits of national jurisdiction and the possible limits of individual state action;

¹ For the present constitutional basis of this question and its historical background, see above, pp. 18-20.

and it was his belief that the National Government had power to fill these gaps, so that no person or corporation should remain outside the control of the law. The recent war made it possible for the Federal Government, in the exercise of strictly war powers, to enter a large part of this unoccupied legislative field. With the return of peace these war powers must now be formally relinquished; but the tenacity with which the Federal Government has held on to them, after the cessation of actual hostilities, in order to meet the emergencies of the period of reconstruction raises the very definite issue whether steps may not be taken to grant to the Federal Government by formal constitutional amendment the powers which by general consent it urgently needs.

Permanent place of the States in the Federal Government. The question of the extension of the powers of the Federal Government might, indeed, be anticipated by an inquiry as to whether it is desirable to retain at all the present system of forty-eight separate state governments with their elaborate organizations of legislative, executive, and judicial bodies paralleling the national organization. To a foreign observer, unacquainted with the traditions of American political growth, the presence of these distinct political units scattered over a country where, except in isolated corners, the economic and social life of the people is approximately uniform must seem a needless multiplication of governing officials and an extravagant expenditure of public funds. But apart from the strength of the American tradition of state rights in the older sections of the country, it would seem that the American people as a whole are convinced that there is a distinct function for these separate state units to perform in the sphere of local self-government, and that this function is worth the price in money and in admitted inconvenience in certain business and social relations. This feeling has been strengthened rather than weakened as a result of the experiences of the war. The assumption of new powers by the Federal Government was paralleled by an administrative decentralization

which threw upon state agencies the task of adjusting to local conditions the uniform provisions of the federal law. As we have seen, the successful execution of the Selective Service Act was due in large part to the local draft boards which acted as intermediaries between the Provost Marshal General and the individual citizen. For the first time since the adoption of the Constitution the Federal Government departed from its procedure of carrying out its laws by its own appointed agents. As a result of this experience the Secretary of War was able to point to "a demonstration of the fact that there is in the state governments a relation so vital to our national strength, a relation so indispensable in times of emergency or disaster of any sort, a relation so essential in times of threatened difficulty, a relation so indispensable to the aggregate, that we know as the United States that from now on the dignity and importance of the state government can never be questioned successfully as an essential part of our institutional system."¹ As a practical issue, therefore, the proposal to discard as outworn the machinery of state government may be dismissed without further comment. But this still leaves unsettled the question whether a number of the powers now exercised by the States could not be transferred to exclusive national control.

New powers needed by the Federal Government. As a preliminary step towards transferring certain of the powers of the States to the Federal Government, an amendment to the Constitution should be adopted conferring upon the Federal Government the power to meet those problems of national importance which transcend the legislative powers of the States and yet which are not within the present enumerated powers of Congress. It is difficult to draw up the precise text of such an amendment, but its general substance can at least be indicated. As a tentative proposal it is suggested that the amendment might be framed along lines granting to Congress the

¹ Address before the Governors' Conference at Annapolis, 1918, "Proceedings," p. 25.

power to assume direct control over all matters in which the needs either of the nation as a whole or of any part of it cannot be attained by the individual action of the several States. These needs may in some cases arise from the demand for legislation protecting the people of one State against acts done or conditions existing in another State, and in other cases they may arise from the demand for positive legislation to promote the national welfare under conditions which cannot be met by isolated state laws. For some years past Congress has been attempting to assume the powers of a national legislature by a broad interpretation of its powers over commerce between the States. The Anti-trust Act of 1890 is a familiar example. By including within the term "commerce" not only the carriers of commerce and the articles transported, but the business agreements by which goods were transported or withheld from transportation, it was possible for Congress to forbid contracts or combinations in restraint of trade or commerce between the States and bring under its control the great corporations whose activities were beyond the reach of the individual States. But in this attempt to protect the public against the power of combinations of capital to fix prices and defeat the normal operation of the law of supply and demand Congress was hampered by the fact that it could not act directly upon the object of offense, but could only seek to reach it through the indirect exercise of its control over the channels of interstate trade. Lack of power to regulate the manufacture of articles and the incorporation of business companies in that capacity prevented Congress from applying the most direct and effective remedy. Duplicate federal and state charters were a possible but not a practicable solution. In the case of the great insurance companies doing business in a number of States, Congress has been unable to take any action at all, owing to an unfortunate decision of the Supreme Court that the business of insurance was not commerce and therefore not subject to the Federal Government.

Control over profiteering. At the present day the need of

more comprehensive powers on the part of Congress is sharply felt in three more or less related fields. In the first place there is the nation-wide call upon Congress to place restrictions upon profiteering in food, fuel, clothing and other necessities of life. So long as the state of war technically continues it is possible for Congress to use the powers of the Food and Fuel Control Act and its amendments¹ to prevent hoarding and manipulation of supplies; and it was equally within the power of Congress to fix the price of sugar during the recent shortage, as the price of wheat was fixed by the original Act. But with the formal close of the war and the necessary abandonment by Congress of its powers there will remain only the power over interstate commerce as a possible means of meeting the situation. While its powers over commerce will enable Congress to control restraints upon the free flow of trade between the States, they will not be adequate to prevent the hoarding and sale at exorbitant prices of goods within the boundaries of a single State. State legislation will be needed to supplement federal legislation, and as in other such cases the offenders may succeed in slipping through the gaps.

Control over nation-wide strikes. In the second place the legal difficulty experienced by the President on the occasion of the strike in the coal mines in November, 1919, shows the need on the part of the Federal Government of more direct power to meet similar emergencies in the future. Orders were issued on October 15 by the executive officers of the United Mine Workers that the strike should begin on November 1st. Conferences between representatives of the owners and of the miners, called by Secretary of Labor Wilson, failed to reach an agreement, and on October 24th the President issued a statement in which the proposed strike was described as "unjustifiable" and "unlawful" because of its effects upon the pro-

¹ The amendment approved October 22, 1919, extends the provisions of the original Act so as to cover foods, feeds, wearing apparel, fuel, fertilizers, tools, utensils, implements, machinery and equipment required in the production of foods, feeds, and fuel.

duction and distribution of the necessities of life. The Attorney General thereupon announced the intention of the Government to establish the illegality of the strike under the circumstances, without however impairing the general right to strike. Accordingly the Government obtained from the Federal District Court at Indianapolis an order restraining the union officials "from doing any further act whatsoever to bring about or continue in effect the above-described strike." The request for this order was based upon the provisions of the Food and Fuel Control Act. The order was confirmed on November 8th, and a temporary injunction was granted on the ground that the miners had been guilty of a conspiracy under the provisions of the Act. The officials of the United Mine Workers were at the same time directed to withdraw the strike order. Three days later the order was canceled. The strike leaders, however, protested against the application to them of the provisions of an Act which was based upon the technical continuance of a war which had ceased in actual fact. Here again, the formal close of the war will throw the Government back upon its inadequate powers over interstate commerce.¹

Control over the raw materials of industry. A further instance of the need of new powers to meet national problems is to be found in the experience of the Government during the war in regard to the control of the raw materials of industry. We have seen that the Priorities Board of the War Industries Board, by classifying the industries of the country according to their importance for the prosecution of the war and for the imperative needs of the public and by assigning to them the necessary supplies on a rationing basis, prevented

¹ It should be observed that the exemption of labor unions from the provisions of the Sherman Anti-trust Act, contained in the Clayton Act, can be undone by Congress, but this still leaves it doubtful whether the power over commerce can be used to defeat a strike conducted by orderly methods for the purpose of redressing grievances, whatever its effects upon the industrial life of the nation.

what might otherwise have been a demoralizing competition between essential and non-essential industries. A similar system of priorities was established by the Food and Fuel administrations and by the Railroad administration in respect to transportation. The indispensable work performed by these priority boards is sufficient to demonstrate the advantages of having recourse to similar methods of control should an economic crisis again demand an interference with the normal law of supply and demand. At the time of the coal strike the President issued an order authorizing the Fuel Administrator to issue such regulations in respect to the production, sale, distribution, apportionment, storage and use of coal as might in his judgment be necessary to prevent profiteering or the increase of prices during the emergency. Here also, it is clear that Congress, deprived of its war powers, will be forced to rely upon its ordinary powers over interstate commerce; and it is more than doubtful whether so comprehensive a control based upon those powers would be constitutional.

Surrender of state control over the instrumentalities of commerce. We may now turn to the more difficult problem of deciding whether certain powers which have in the past been recognized as belonging to the several States should be transferred to the Federal Government for the sake of greater efficiency and a more uniform administration. It would carry us too far afield from our main problem to discuss all the details of so complex a question, but a few leading principles may be offered by way of a tentative solution which is within practicable bounds. In the first place it would seem that the States should be called upon to surrender their local control of the great channels of transportation and communication which are by their very nature national institutions. Before the war a system of joint control was in operation, in accordance with which the Federal Government regulated that part of the business of the companies which concerned commerce between the States, while the state governments regulated the local services performed by the companies. The result was

a continuous conflict of jurisdiction between the Interstate Commerce Commission of the Federal Government and the public service commissions of the several States. For it is clear that no hard and fast line could be drawn between services which crossed state lines and services which were performed solely within them. During the war the state public service commissions surrendered their measure of control to the Federal Government, and the national and local functions of the railway, telegraph and telephone companies were performed as a single service. The restoration of the latter companies to their former owners revived the activities of the state commissions, and in that respect matters now stand where they were before the war. Greater difficulty is being experienced, as will be seen later, in restoring the railways to their former owners, but of the many solutions for the problem practically all contemplate either that the local control of the States be abandoned and that there be substituted in its place a regional grouping of the railroads based upon the organization of the railway systems and not upon artificial state lines, or else that the federal control be broadened to a greater or less degree.¹

Cooperation as a substitute for constitutional unity. In the second place it is proposed that a more consistent scheme of cooperation should be worked out on the one hand between the States as a whole and the Federal Government, and on the other hand between the separate States themselves. At present the jurisdiction of the Federal and state Governments is not at all points mutually exclusive, and in a number of matters federal and state regulations exist side by side, the former taking precedence in cases of conflict but not over-

¹ It is of course compatible with such a surrender of state control that some plan of administrative decentralization should be worked out in accordance with which representation should be given to members of the public service commissions of the States upon the regional commissions administering the different railway systems, so that the local needs of the States could be adequately presented and a degree of local supervision maintained.

ruling the latter when restricted to strictly local affairs. But in these instances of overlapping jurisdiction there is a complete lack of cooperation between the two governing agencies. No systematic attempt has been made to bring the state laws with respect, for example, to pure food and drugs into harmony with the federal law and thereby secure the advantages of a unified administration. A more recent illustration of the possibilities of cooperation is to be found in the inclusion by Congress of stolen automobiles among articles which, if transported from one State to another, will bring the offender under the federal law. Here the Federal and state Governments might well work out a plan of concerted action which would be far more effective than isolated individual efforts to enforce the law. In like manner cooperation between the States themselves by the adoption of mutually protective legislation would be greatly to their advantage in cases where the Federal Government is constitutionally unable to give its assistance. Under present conditions, for example, when a fugitive criminal escapes from one State into another the authorities of the State in which the offense was committed have no power to pursue the offender across the state line and can only call upon the authorities of the other State to arrest the offender pending the presentation by the governor of a formal request for extradition. Moreover, there are numerous matters in which the mutual convenience of the States would be greatly furthered by the adoption of general legislation in place of the present individual state laws. Under the Constitution the wide field of the business relations of daily life is within the legislative jurisdiction of the several States. Contracts, title to real and personal property, wills, corporation charters, are but the beginning of the list of interests for the regulation of which there exist forty-eight bodies of state law either in codified form or in the decisions of the courts. The inconvenience resulting has so often been complained of that it is difficult for the layman to understand why the remedy has been so long delayed. The present uniform negotiable instruments law

is an object lesson in the possibility of cooperation between the States in these matters, but thus far the efforts made in various quarters to secure further uniform laws have not met with any notable success. Private agencies of cooperation, such as the annual meetings of the state bar associations, are however, numerous, and it would seem to be only a question of time until public opinion shall be sufficiently educated to bring the necessary pressure to bear upon the state governments to take action.

The sphere of local autonomy. By contrast with these business relations there are other questions of social policy which bear upon the personal habits of the people, their standards of moral conduct, and their ideals of community welfare. Here it is generally admitted that local state autonomy should continue to prevail, modified only by such measures of cooperation as are called for by the mutual convenience of the States. The regulation of the hours and conditions of labor, of minimum living wages, of the liability of employer to employee, the control of the use of intoxicating liquors,¹ the censorship of moving-pictures, the direction of education and the support of educational institutions, would seem to fall primarily within

¹ It is of interest to note that the 18th Amendment prohibiting the manufacture and sale of intoxicating liquors represents, with the exception of the abolition of slavery, the first transfer from state to federal control of a matter relating to the personal habits of the people. The Amendment contains, however, a provision giving to the several States a power concurrent with that of the Federal Government to enforce the Amendment by appropriate legislation. It is difficult to forecast what interpretation the courts will place upon this provision, which is an anomaly in American constitutional law.

On June 7, 1920, a decision was handed down by the Supreme Court in which the court, while holding that the constitutional amendment had been legally adopted and was in every respect effective, interpreted the phrase "concurrent power" as not reserving to the States any express right, equal to that of the National Government, in the enforcement of the amendment. The result was to invalidate the various state laws interpreting the word "intoxicating" more liberally than had been done in the one-half of one per cent. prescription of the Volstead Act.

the control of the units of state government, or within the control of local municipal officials by delegation from the state government. So also, measures of social relief, such as insurance against sickness, unemployment, and old age, and loans in aid of farm improvements should be based upon local rather than national initiative. It is not denied, of course, that more immediate and efficient results might be obtained by a common national policy in these matters; but preference is here given to individual state action on the principle that the local communities know best the conditions which the law is intended to overcome and their cooperative support is vital to the permanent success of reforms of this character. The Federal Government may continue to act as an agency for the diffusion of information, following the present policy of several of the administrative departments in issuing bulletins of an educational character dealing with subjects within their range, but it should not attempt to create its own agencies for the furtherance of its plans or assume to control rather than to guide.

The problem of federation. Federation as opposed on the one hand to complete centralization of power and on the other hand to isolated independence is, indeed, the great political problem of the age. It is urgently pressing its claims as the solution of the continued territorial integrity of many of the great States of the world, and the wisdom of statesmen is being taxed to discover that just apportionment of governmental power which will preserve unity of empire without denying the claims of local autonomy.¹ In some cases the movement was already on foot before the war and the war merely gave a new impetus to it; in other cases the war accomplished directly what it might otherwise have taken years to accomplish. Great Britain is faced with the question in a two-fold form. There is the demand on the part of the great self-governing colonies for a right to sit in the councils of the empire, and there is the

¹ The same problem presents itself on a larger scale as a solution of the relations between the nations themselves as members of the larger international community. See below, p. 305.

proposal, at present under consideration by a parliamentary committee, of establishing local legislatures for England, Scotland, and Ireland, not as a matter of meeting the imperative demands of self-determination, except in the case of Ireland, but as a means of decentralizing authority and thus securing a government at once more democratic and more effective. France, as we have seen in an earlier chapter, is working upon a plan of administrative decentralization which may break up the close unification of authority in Paris. Germany has evaded for the time the issue of recreating the old political units which were absorbed into Prussia against their will, but the problem undoubtedly remains to be solved upon a federal basis before the new republic can become stable. Austria-Hungary, though dismembered for the present, must ultimately be driven to create some loose bond of union with her neighbors north, east, and south. Russia is at present in the throes of a civil war in which the autonomy of regions of the country is playing almost as important a part as the antagonism of classes. By contrast, the Yugoslav Federation represents an attempt to create a central government to meet the interests of States which are unwilling to sacrifice completely the rights of self-government demanded by their history and traditions. It is an interesting problem in the study of comparative government that the United States should at the present time be tending towards a greater centralization of power at Washington when other great nations are seeking a solution of their problems in a greater decentralization.

Reorganization of the Federal Government. Next in order to the problem of drawing in a clearer and more logical way the dividing line between the powers of the Federal Government and those of the several States is the problem of the reorganization of the Federal Government as a separate agency. It was pointed out in an earlier chapter that the system of checks and balances was deliberately introduced into the Constitution of the United States to accomplish purposes desired alike by conservatives and radicals. That the system is not a

logical one, based upon sound principles of administrative organization, no one can now deny; that it would work inefficiently even in the case of a government far less complex than our present one might have been predicted; that the conditions under which the Constitution was framed have completely changed, and that a system which was designed for one purpose is being made to serve another for which it is unfitted, is a fact of daily observance. It remained for the war, with its record of a year and a half of ill-concealed friction and inefficiency to impress upon us the need of seriously setting about the task of reconstruction. The problem of the moment is not whether greater cooperation should be sought between the legislative and executive departments, but by what means that cooperation can be attained. Must a thoroughgoing alteration be planned and the Constitution amended so as to put it into effect, or is it possible to secure a satisfactory remedy which will at once cure the more serious defects of our system of government and yet leave intact the constitutional relations between the departments of the Government?

Relations between Congress and the President. The controversy in the Senate attending the passage of the Overman Act¹ may be taken as a typical illustration of the relations between Congress and the Executive. The President was, as we have seen, dependent in the exercise of his executive powers upon the action of Congress, and could but stand by impatiently until the necessary legislation was passed. If Congress differed with him as to the advisability of a particular measure, he could present his views in person or through the mediation of a member of the committee in charge of the bill; but he had no permanent or regular channel of communication with the two bodies. Had the United States been hard pressed at the time of its entrance into the war the delays experienced in getting Congress to pass the necessary legislation would have been acutely felt. It was, of course, to be expected that Congress should debate long before adopting so important a meas-

¹ See above, p. 193.

ure as the Selective Service Act, which marked a striking departure from the traditions of the people and which three years before would have been considered as utterly out of the question in a war not fought for the immediate defense of the soil of the United States. But other measures in which policies of lesser moment were involved were unduly delayed, or even completely side-tracked, either because Congress was distrustful of the executive department and unwilling to surrender to it the sweeping powers it requested, or else because Congress, not being immediately responsible, failed to realize the urgent need of the measures called for by the Executive. Thus Congress allowed itself to play the ordinary game of partisan and provincial politics at a time when every hour's delay increased the danger that the war might be won by Germany before the forces of the United States could be put into the field. No doubt a higher degree of statesmanship on the part of Congress and greater tact on the part of the President might have facilitated the removal of these human elements of obstruction. But the fact that they existed at all makes pertinent the inquiry whether the grave danger which they presented in time of war cannot rouse us to remove the standing obstacle they form to efficient government in time of peace.

Radical changes undesirable. The plans suggested by which a permanent bond of unity might be created between the Executive and Congress vary all the way from such mild proposals, as that the heads of the administrative departments should be included among the members of the committees in Congress which deal with their respective fields of administration,¹ to such radical proposals as that of transferring the initiative in legislation to the executive department and making the members of the President's cabinet the chairmen of the committees in Congress. With respect to the latter proposal and

¹ A sketch of such a plan for closer relations between the Cabinet and Congress appears in "The Business of Congress," by Samuel W. McCall, at the time of writing member of Congress from Massachusetts.

others of a similarly far-reaching character it may be said that whatever the merits of the cabinet form of government in the abstract, the engrafting of it upon the Constitution of the United States must as a practical question be left out of consideration for the present. American political institutions have developed along their present lines too long to be abruptly transformed without causing a degree of disorganization which would result in far greater evils than those attending the present system. The people of the country, with all their interest in political policies, have given too little consideration to the organization of the Government to be ready to support any fundamental change in it. However seriously cabinet government might be considered, therefore, were the Constitution to be recast as a whole, present expediency points in the direction of improving existing agencies and developing them through successive stages towards the desired ideal. When we have experimented with transitional measures we may be ready for the final logical step.

Proposal that the Executive present measures to Congress. More moderate proposals, which nevertheless promise to effect a real measure of improvement, take the form of demanding "that the administration shall propose and explain all its measures — the bills and the budget — openly in Congress and fix the time when they shall be considered and put to vote."¹ It is argued that, as it is a well known fact that the administration is really the guiding force behind the party in power, assuming it to be of the same political complexion, it would be desirable to have it do in a formal and public manner what it now does by means of personal conferences with the leaders in Congress. At present too much secrecy attends the passage of a bill, and there is the fullest opportunity in the sessions of the committees and in the caucuses of the party groups for evasions of responsibility in respect to the details of the bill as finally passed. Amendments in one form or

¹ H. J. Ford, "A Program of Responsible Democracy," in "American Political Science Review," August, 1918, p. 492.

another may so far emasculate the bill that it ceases to be in reality the measure advocated by the Executive. Whether this proposal would ultimately result in the complete transfer of the initiative in legislation from Congress to the Executive is a question which need not be determined in advance. Its adoption need not interfere with the retention by Congress of its coordinate initiative in legislation, in accordance with which it would draft bills of its own in case the Executive failed to act, and would propose bills in competition with those of the Executive, leaving it to the test of discussion and debate to determine which of the two should prevail. By way of example Mr. Ford calls attention to the provisions of the Swiss Constitution which provides that the Federal Council, which corresponds to the President and his Cabinet in the United States, "shall introduce bills or resolutions into the Federal Assembly," and that its members "shall have the right to speak but not to vote, in both houses of the Federal Assembly, and also the right to make motions on the subject under consideration." By leaving the drafting of bills to the administration, even to the extent of allowing it to reshape the language of the bill so as to include amendments desired by the Assembly, the danger of a bill defeating its own purpose by having unnoticed restrictions attached to it is largely obviated. The publicity attending the whole process makes it impossible to introduce the "riders" which are so frequently tagged on to the legislation of our Congress.

Presidential initiative in legislation. It would seem somewhat idle, in view of the changed conditions and the present complexity of public business, to inquire whether the assumption of such a rôle by the Executive would be consistent with the original purpose of the Constitution. The terms of the Constitution at least do not preclude the appearance of the Executive before Congress to present and defend its measures. It is specifically provided that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall

judge necessary and expedient." In the exercise of its right to "determine the rules of its proceedings" Congress could without objection fix the times when the administration bills might be presented and debated. But that Congress should abandon entirely the initiative in legislation would undoubtedly be inconsistent with the spirit, if not the letter, of the Constitution. What distinguishes Congress from the legislative bodies of governments in which the cabinet system prevails is precisely that Congress has never formally admitted the leadership of the Executive in legislation, and that, whatever the influence of the Executive upon the party councils of Congress, Congress has regularly originated law upon questions of the widest variety and has not hesitated on one occasion after another to take an active share in the administration and guide the hand of the Executive by mapping out in detail the duties of the administrative departments. It is now proposed that a more logical division of power shall be made. "The cure for all our constitutional defects," says Mr. Ford, "the remedy for all the varied ills of our politics, is the conversion of Congress into an organ of control. . . . The cardinal principle is that the representative body shall have absolutely no share in the administration; then, and only then, will it form a system of national control over the administration in behalf of the people. It cannot share in the administration and hold control over it at the same time."¹ The correct principle, it is thus asserted, is not that one department of the Government should frame the laws and another department execute them, but that one department, the Executive, should both frame and execute the laws, and the other criticise the laws as framed and control the execution of them by the administrative agencies.

Congressional initiative in theory and in practice. The proposal that Congress shall become as it were a "board of directors" and shall limit its functions to those of criticism and control, whatever its abstract advantages as being in ac-

¹ "The War and the Constitution," *Atlantic Monthly*, October, 1917.

cordance with sound principles of business administration, has a rough road of Congressional opposition to travel, even if its adoption could be brought about without doing violence to the terms of the Constitution. The tradition of legislative initiative is still strong, even though the individual member enjoys but an insignificant part in the actual process of legislation. In theory the members of a legislative assembly come together to present the points of view of their several localities and by common counsel to adjust their divergent interests so as to reach a decision which will promote the welfare of the country as a whole and thus indirectly benefit their distinct groups of constituents. Under such a theory the congressman is more than a mere critic of the policies advanced by the executive department. He is the spokesman of constituents who have distinct views of the means which should be taken to attain the national prosperity, and he enters into discussion and debate with his fellow congressmen on the floor of the assembly in order that by the contact of their individual convictions they may mutually correct and modify what was narrow and provincial in their original outlook. Obviously such a conception of legislative duty involves the right of the individual member to propose measures on whatever subject he or his constituents believe will promote the national welfare. To ask him to forego the initiative in legislation is to ask him to sit by idly until another branch of the Government not so closely in touch with the people is ready to bring forward a measure which may or may not embody the ideas he wishes to express.

Such a conception of Congressional duty might with some justice be defended against encroachments of the Executive if in reality the average member of Congress had an opportunity to present and advocate the views of his constituents. But as is well known the business of Congress is performed through the agency of committees, and the question whether an individual member shall be able to present bills which he desires to have adopted becomes largely a question of the committees upon which he happens to be appointed. The House of

Representatives has in fact long since ceased to give any recognition to the individual member, and has become a highly organized business body with committees covering every part of the field of legislation. These committees are, in reality, a series of small cabinets whose sessions are conducted in secret and whose chairmen constitute a group of the elder statesmen who have won their places by right of seniority. At the same time the organization of the House by committees has resulted in its losing its character as a deliberative body. The finality with which the reports of the committees are generally received leaves no room for discussion and debate on the floor of the House; and considering the immense volume of legislation annually adopted the mere lack of time would be sufficient to silence the individual member. Instead of the meeting of many minds and the framing of legislation representative of the collective judgment of the nation, we have the decisions of small groups whose breadth of outlook is scarcely to be compared with that of the President and his departmental advisers. For all practical purposes, therefore, the individual member of the House of Representatives has not only lost the power of legislative initiative in national matters, but has been deprived of the opportunity of offering counsel and criticism. On the other hand, if the committee system represents the abandonment by individual members of an actual share in legislation, the practice of "log-rolling" applied to private appropriation bills represents the abandonment of any collective judgment on the part of the House as a whole in dealing with such matters. Whether it be the fault of the representative who seeks to secure his hold upon his district by distributing jobs and contracts among influential adherents, or whether it be the fault of the district itself which judges of the value of its representative's services by the pickings he is able to secure from the "pork barrel," it is clear that the public at large would welcome the transfer to the Executive department of the initiative in framing such bills and in determining the needs underlying the applications for local improvements. It is a curious com-

ment upon democratic government to witness the appeals to the President to save the country from the extravagances of its own locally elected representatives.

Proposed plan of a national budget. The demand for an executive budget is based upon larger considerations than the mere correction of the scandals connected with private appropriation bills. Its object is to put the financial affairs of the Government upon a sound basis by authorizing the President, who is responsible for the actual administration of public affairs, to draw up a consolidated budget which shall contain a definite statement as to the condition of the treasury at the time, the revenues and expenditures of the Government during the preceding and the current years, and the revenues necessary to meet the expenditures which must be made during the coming fiscal year. This authority in the head of the administration will unify the requests of the several departments for the grant of funds, so that thereafter no requests shall be made to Congress directly from the officers of the departments. The budget thus prepared, with its balances of revenues and expenditures and its classification of each according to units of administration, shall be submitted to Congress by the President at the beginning of each regular session, accompanied by a special message presenting a survey of the financial affairs of the Government. Congress in turn is to refer the budget to a special joint Committee on Finance of the two houses. This committee, in drawing up the appropriation bill, shall follow the same scheme of classified items that was followed in the budget, and shall, in making its recommendations to Congress, compare the amounts estimated for in the budget with the amounts actually recommended by the committee, with a statement of their reasons for departing from the estimates of the budget. These itemized appropriations shall not be increased by Congress except upon a two-thirds affirmative vote. Finally, provision is to be made for an auditor general, who shall be an officer of Congress and not of the Executive, and whose duty it shall be to examine the accounts of all expendi-

tures by the administrative departments and to report to Congress the results of his findings. In this way Congress will be able to exercise an effective control over the Executive and hold it to a rigid accountability.¹

Transfer of legislative initiative to the President. The adoption of an executive budget might well be a first step towards the transfer from Congress to the Executive of a gradually increasing degree of the initiative in legislation. As we have seen, the question becomes for the individual member of Congress a choice between committee rule and the formal acknowledgment of executive leadership. On the other hand the choice for the public at large is between the continuance of the extravagances in the expenditure of public funds, with consequent increase of taxes, and the renunciation by the constituents in the several districts of the selfish advantage of being the occasional recipients of favors from the appropriation committees. Looking at the question in its larger aspects, Congress as a whole has much more to gain than to lose from

¹ Summarized from a pamphlet entitled, *A National Budget System*, by W. F. Willoughby, published by the Institute for Government Research. For a more detailed study of the subject see the same author's "Problem of a National Budget," 1918. At the opening of the special session of Congress in May, 1919, a "bill to provide for a national budget system and an independent audit of government accounts and for other purposes" was introduced by Mr. Good, chairman of the House Committee on Appropriations. The bill carries into effect the chief provisions of the plan outlined above, with the exception of the part relating to the action of Congress upon the budget when it comes from the hands of the Executive.

On May 29, 1920, Congress finally passed the McCormick-Good Budget bill, one provision of which was to the effect that the Controller General and the Assistant Controller General, who were to be appointed by the President with the advice and consent of the Senate, might be removed at any time by a concurrent resolution of Congress after notice and hearing. This provision was regarded by President Wilson as an unconstitutional encroachment upon the powers of the Executive, and as a result he vetoed the bill on June 4, while expressing himself "in sympathy with its objects." The bill was amended by the House, but failed to pass the Senate before its adjournment on June 5.

the proposed transfer. The debates which gave dignity to the House of Representatives in the days of Webster, Calhoun, and Clay might in some measure be restored,¹ and the critical and constructive knowledge now reserved for the committee rooms might be displayed upon the floor of the House and thus reach the country in a way in which the reprints of undelivered speeches have never done. The House should speak for the nation; it should be able to watch the Executive and call it to account for its acts; it should be able to interrogate the heads of the administrative departments and obtain from them in the open sessions of Congress the information which they are now called upon from time to time to give to the committees; it should be a forum for the frank discussion of present issues and future policies. Only thus can the "common counsel" and "meeting of minds" from all corners of the nation be applied to the solution of the pressing political problems before the country. To do this no more is required than a change in the rules of Congress, which it is entirely within the constitutional authority of that body to make.²

Possible deadlock between President and Congress of different political parties. One serious weakness of the system of checks and balances under which the Government of the United States operates is the possibility of party friction which is offered by the different terms of office to which the President and members of Congress are elected. At the moment of pres-

¹ For a brief moment during the war the House of Representatives appeared to rise to the full stature of a deliberative assembly in the presence of the great war measures presented by the Executive.

² Mr. F. A. Cleveland outlines an elaborate plan by which Congress might become a "court of inquest" and develop a trial procedure in which "the case of the people against the Government" would be heard. "Democracy and Reconstruction," Chap. XX. The idea is suggestive, but as it would involve the necessity of having the President reorganize his Cabinet in case a motion of lack of confidence were carried, and would thus logically lead to cabinet government of the type of the British Parliament, it may better perhaps await its turn until more tentative steps have been taken.

ent writing the contest between a President elected by one political party and a Senate controlled by another party is reaching its climax after more than a year of heated controversy between the two branches of the treaty-making authority. No one will contend that the party alignment in the Senate has represented in all cases the convictions of the members on the merits of the peace treaty. A problem of foreign politics, which has no proximate connection with the traditions of either party,¹ and which was not an issue at the time of the last election, has been thrust into the forefront of partisan debate, with the result that a practical deadlock in the operations of the Government has been reached. The Executive department, which controlled the negotiations of the treaty, is powerless to obtain its ratification by the necessary two-thirds in the Senate, while the majority in control of the Senate, although able to prevent the ratification of the treaty in the form desired by the President, is powerless to bring about the negotiation of a treaty after its own desires. In the meantime the inaction, which is often more demoralizing than mistaken action, is making the nation a spectacle of defeated democracy. Similar situations have arisen before in connection with domestic problems, as in 1890 when a Democratic House of Representatives could make no headway with tariff reform against a Republican Senate and President, but the worst that has resulted in such cases was the temporary suspension of legislation of a character that might accrue to the advantage of either party. When, however, questions of foreign policy are involved, and especially when issues of war and peace are at stake, it is imperative that there be no undue delay in reaching a decision. At the same time it is more than ever necessary that such questions be considered strictly on their merits, because of the greater responsibility attending the decision and the difficulty of undoing what has been done. The only solution, apart from a change in the

¹ If traditions based upon the policy of "imperialism" adopted after the Spanish-American war were applied to the situation, they would seem to call for a reversal of the present alignment.

Constitution, which offers itself in such cases of divided party control is that the Executive should attempt to forestall opposition in the Senate by appointing as commissioners for the negotiation of the treaty representatives of both political parties.

Executive control over steps leading to war. Connected with the general problem of the reorganization of the relations between Congress and the Executive is the question whether some means cannot be devised by which Congress may exercise a check upon the Executive in cases where the friendly relations of the United States with a foreign country are involved. The issue was raised acutely at the entrance of the United States into the war, but has been left unsettled in the presence of more urgent problems. It involves the attempt to draw a line between the general powers of the Executive to direct negotiations with foreign countries and the specific power of Congress to declare war. Is the President to have a free hand in the conduct of foreign affairs even to the point where war is practically inevitable, leaving only to Congress the power actually to declare war, or may Congress intervene in the negotiations when they have reached a point where there is danger of a rupture of friendly relations? The former situation is undoubtedly the correct one as judged by the consistent practice of the Department of State, but it is obvious that it may easily nullify the power to declare war by putting Congress in the position of being obliged either to back out of a position assumed by the Executive, with consequent humiliation according to the accepted standards of international relations, or else to support the Executive and to declare war against what would have been its judgment had it been consulted in advance. The student of history is familiar with the manner in which President Polk, acting on his own discretion, gave orders to the army to undertake movements which had the inevitable effect of bringing on an attack by the Mexican forces, in reply to which Polk announced: "War exists, and, notwithstanding all our efforts to avert it, exists by the act of Mexico

herself." In 1895 a striking instance of the way in which negotiations by the Executive, without knowledge of the people or control by Congress, could reach a critical point was given in the message of Secretary Olney to Great Britain in the Venezuela boundary controversy. Had an equally sharp reply been received from London it is more than possible that Congress might have found itself in a position where it would have been difficult to avoid maintaining by force the "national self-respect and honor" which President Cleveland believed to be involved in the case. Again in 1914, when our relations with Mexico were strained as a result of the affair at Tampico, President Wilson gave orders to the Navy to prevent certain cargoes of arms and ammunition from falling into Mexican hands, with the result that the port of Vera Cruz was occupied by American marines and lives were lost on both sides. The occupation of Vera Cruz amounted in fact to war against Mexico. Had the latter been in a position to take up the challenge, Congress would have found it difficult to refuse to support the Executive.¹

Claims of Congress to joint control. It would seem, therefore, that Congress might justly claim the right to be consulted by the Executive before any step is taken in negotiations with a foreign State which might endanger the continuance of friendly relations. But since by the custom of the Constitution the President has regularly exercised his power of conducting foreign affairs without acknowledging any authority on the part of Congress to call him to account, the difficult question is presented how Congress is to demand effectively even so limited a participation in the action of the Executive, in case the latter should refuse to make the conces-

¹ Further instances might be cited, such as the action of President Roosevelt in 1903 in forbidding the landing of Colombian troops within fifty miles of Panama, which made it impossible for Colombia to subdue the revolution in that district and would undoubtedly have led to war without the previous implied consent of Congress, had Colombia been in a position to maintain her legal rights by force.

sion. In all other respects the authority of the Executive in the conduct of foreign affairs has been exercised without any sense of responsibility to either of the other departments of the Government. No legal restraints are placed by the Constitution upon the President's powers. Vital and far-reaching as may be the results of the decisions that he makes, his responsibility is to the people directly, and there is no other recourse than to rely upon his sense of honor, good judgment and desire to promote the welfare of the country. His executive prerogative embraces "an unlimited discretion . . . in the recognition of new governments and states; and undefined authority in sending special agents abroad, of dubious diplomatic status, to negotiate treaties or for other purposes; a similarly undefined power to enter into compacts with other governments without the participation of the Senate; the practically complete and exclusive discretion in the negotiation of more formal treaties, and in their final ratification; the practically complete and exclusive initiative in the official formulation of the nation's foreign policy."¹ Doubtless if a general revision of the Constitution were in progress a reorganization of the relations between Congress and the Executive would include some measure of control by Congress as a whole, or by the Senate in its treaty-making capacity, over the business of the Department of State. A single amendment directed to that object would present complications which would be difficult of adjustment with the other clauses of the Constitution. At present Congress can do no more than request the Secretary of State to appear before its committees on foreign affairs and furnish such information after the event as it may seem expedient to that official to make public.

Difficulties of popular control over foreign policies. It is a problem for those who advocate democratic control of foreign policies to devise some machinery by which the peo-

¹ E. S. Corwin, "The President's Control of Foreign Relations," pp. 205-206.

ple may be able to express their views upon the more pressing questions which arise from time to time in the intercourse of nations. The same problem presents itself to those who are unwilling to leave to Congress the decision to make war, and who demand that Congress be guided by the results of a national referendum. In both cases the difficulty lies in framing the issue in such a way as to obtain a popular verdict which will not tie the hands of the Executive and of Congress when new circumstances arise. It is well within the range of practical reforms to advocate open diplomacy, and to insist that the public shall have full information of each important move in the exchange of diplomatic notes, leaving it to Congress and the Executive to be guided by the indications of public opinion which come from day to day from the press and other agencies of national communication. But to attempt to formulate delicate questions so as to enable the public to return an authoritative answer is to assume that it is possible to express an opinion in positive terms upon a subject which by its very nature requires an answer containing qualifications and discriminations. The initiative and the referendum may in time come to be used as freely in national affairs as they are at present used in many of the separate States, but as applied to the conduct of foreign affairs it will always be necessary to consider that there is another party to the negotiations, to whom we cannot dictate but only make advances and offers, and whose next move in the exchange of diplomatic notes may make the latest expression of public opinion by referendum beside the point.

The extension of the functions of government. Next in importance, politically, to the problems raised by the war in connection with the organization of the Federal Government are those raised in connection with the extension of the functions of government. During the decades preceding the war the Federal Government and the Governments of the separate States already were advancing more or less rapidly into the new fields of legislation in which economic and social problems

of the widest variety were brought within the control of the law. The war accelerated the progress of this tendency, and has pushed us to the point where it is important to inquire whether we wish to continue along the same path or retrace our steps back to some limit beyond which no further advance should be made. The problem may be stated in terms of drawing a definite line between the proper sphere of governmental activity and the outlying fields of individual activity upon which it is inexpedient that the State should encroach. The older traditions of American Government have favored a policy of individualism in regard to the control of the Government over industrial and social life. Partly due to economic theories dominant at the close of the 18th century and during the first half of the 19th century, and doubtless even more largely due to the physical conditions attending the development of a new country, the belief was widely held that governments should limit their functions to the maintenance of law and order in the community and to the protection of the rights of person and of property, leaving it to the citizens themselves to look after material and moral needs. Opportunities being open to all, it was sufficient for the Government to secure fair play between individuals, and to allow the law of competition to secure on the one hand the largest production of the material goods of life and on the other hand a fair distribution of the profits of production among those who had contributed to it. Artificial laws framed to interfere with the progress of this natural law could not but be an obstacle to progress. At the same time any proposal on the part of the Government to act as a positive agent in promoting public welfare represented an attempt to do for men what they could do equally well or better for themselves, and therefore tended to weaken their spirit of self-reliance and individual initiative.

Control over railroads and trusts. This earlier conception of the limitations upon state action had already been abandoned in many fields before the United States entered the war in 1917. The building of the great railways inevitably tended

towards monopolistic control and required the intervention of the Federal Government and the creation of a special agency of regulation. The growth under the law of competition of huge combinations of capital threatened to destroy the very law under which they had grown up, and the Federal Government was called upon to put forth a prohibition against such combinations when a purpose was shown to place restraints upon the freedom of commerce. That the policy followed by the Government was not a logical or consistent one can scarcely be denied. As a means of protecting the public the Government sought to enforce competition among the railroads and to prevent pooling of rates and services, but at the same time it found it necessary to control rates and services directly in cases where the law of competition could not operate effectively. On the other hand, as regards monopolies and trusts the law of competition was enforced, but it remained uncertain whether combinations were to be prosecuted which did not actually have the effect of restraining trade. At first the interpretation of the law by the courts penalized combinations as such, on the ground of the potential if not actual restraint of trade which they involved. But subsequently this position was reversed and mere combinations, apart from unfair practices in their formation, were exempted from the terms of the act.¹ The result was that, with the exception of the railways, combinations of capital remained unregulated except in respect to their methods of combination, while the public remained practically unprotected except where there were overt acts showing an intent to obtain a monopoly over any part of trade or commerce.

Governmental control during the war. The needs created by the war, as we have seen, greatly widened the sphere of governmental control over industrial life. The raw materials

¹ The recent decision of the Supreme Court in the case of the United States Steel Corporation again applies the "rule of reason" formulated in the Standard Oil and American Tobacco Company cases.

of industry were brought under control in so far as was necessary to secure the manufacture of the necessary war materials; priorities were established and a system of rationing was adopted; corporations were created as subordinate departments of the Government for the construction of merchant shipping; the railways were taken over by the Government and placed under a director who administered them as a whole; the telegraph and telephone lines were in like manner converted into government agencies under direct control. Even in matters not so directly connected with the prosecution of the war the Government enlarged its sphere of action and undertook to fix a guaranteed price of wheat both to stimulate production and to offset a rise in prices; it regulated other foodstuffs by means of a wide variety of voluntary and semi-compulsory methods, and in the exercise of its power to raise and support armies the Federal Government entered still further into the reserved domain of State legislation and authorized prohibition of the use of foodstuffs in the manufacture of intoxicating liquors; it regulated the distribution of coal among non-essential industries even to the extent of ordering a complete cessation of work in factories on Mondays during a critical period. In these and other ways Congress and the Executive met the emergency of the war by the assumption of new powers or the enlargement of existing powers wherever such action appeared to conduce to the attainment of the primary object of winning the war.

Effect of war measures upon peace policies. It was impossible, however, that the enlargement of the sphere of government control over industry during the war should not have the effect of opening up new fields for the control of industry in time of peace. The traditional distrust of governmental interference was greatly lessened by the experience of the war administration. Rather the public at large came to look to the Government as a source of protection against conditions which appeared to be beyond the control of the ordinary economic laws which had hitherto been their safeguard. When demand so

far exceeded supply it was clear that competition was no protection against exorbitant prices until the point of maximum endurance had been reached. Luxuries might be given up, but the necessities of life could not be denied, and the reduced quantities of these commodities left the consumer no option but to pay the price demanded. In consequence no opposition was manifested by the public at large when the Government continued to exercise during the months following the armistice the powers of control which belonged to it only by virtue of the technical continuance of the war. The problem of the present moment is to determine what permanent provision may be made for such measure of control by the Government over industry as may be from time to time necessary to compensate for the temporary suspension of the protection normally afforded to the public by the law of supply and demand.

Railway reorganization. But while there has been a demand for the interference of the Government in industry to the extent of protecting the public against abnormal conditions which have afforded an opportunity for profiteering, the attitude of the public towards the direct administration by the Government of public service corporations, such as the great agencies of transportation and communication, has been cautious and hesitating, if not directly in opposition. Doubtless the most pressing problem of reconstruction before the Federal Government during the year following the armistice was the determination whether and under what conditions the railroads should be returned to their owners. The benefits in service obtained from the centralized control put into effect by the Government were so obvious that there was a clear and insistent demand that the railroads should not be allowed to revert to their former condition of separate and competing systems. Even before the war it had been clearly recognized that the Sherman Anti-trust Act and its various amendments had imposed upon the railroads a competitive system which each succeeding year showed to be out of harmony with sound

economic principles. The theoretical gain which was to accrue to the public from the enforced underbidding of the several systems had proved illusory, and had resulted either in cut-throat and mutually destructive competition or in combinations devised to present a show of competition where there was in reality a unity of management. The unified administration of the Director General during the war showed the possibilities of economy and efficiency which could be effected through the merger of lines and terminals, of rolling stock and general equipment. At the same time shorter routes were mapped out and through shipments were facilitated. Most important of all it was shown that when the railroads were being operated as a unified system it was possible to adjust them to the needs of the country far better than when they were operated as isolated and competing lines.

Government ownership as a solution. It was one thing, however, to recognize the advantages of centralized control and another thing to determine how a unified system might be established for normal times of peace. Direct government ownership appealed only to a relatively small minority. It was advocated by the Socialist party as part of its general economic program of public ownership of the instruments of production and distribution. Other less radical groups, without relying upon abstract theories, held that sound business principles called for a unified system of control, and that only under government ownership could such a system be satisfactorily worked out. While admitting the possibility of the intrusion of politics into the administration of nationalized railways, they were convinced that checks could be devised to offset this danger. As against these arguments, elaborated in detail, the actual experience of the operation of the railways by the Government during the war seemed to others conclusive. How far the judgment of this larger body of the public was reached after a fair estimate of the difficulties under which the Government Director labored, and of the fact that the interests of the individual traveller and shipper had to be subordinated to the

requirements of the war administration, is another question. The chief count in the indictment brought by the general public against the Government's administration appeared to be based upon the observation that no obvious improvement in the character of the service rendered was seen as a result of the transfer of the employee from the employ of private capital to that of the State as a whole. If anything, the greater security of employment under government control appeared to have the effect of weakening discipline. On the whole the verdict of the public, in so far as it may be judged from the columns of the press and from the resolutions of conventions, seemed to take into account only its own losses from government control and failed to balance them against the advantages accruing to the country as a whole in the prosecution of the war. A fairer attitude towards the war administration of the railroads would be to regard it as an inconclusive test of the results of government administration in normal times, and to draw from it no more than tentative inferences in respect to particular phases of the problem.

Private ownership with government control. The chief preoccupation of Congress, therefore, during the post-armistice period was to find some method by which the improved service resulting from unity of operation could be maintained without resorting to direct government ownership and administration. Numerous plans were proposed by which mergers of competing companies might be made; regional systems were mapped out in accordance with which the consolidation of local roads might be either permitted or compelled. The number of these regions varied from six, as proposed by the Director General, to twenty to twenty-five, as proposed by the chairman of the Senate Committee on Interstate Commerce. The Esch-Cummins bill, as finally adopted, empowers the Interstate Commerce Commission to divide the country into a limited number of regions and to formulate a plan for the voluntary consolidation of the railroads within these divisions, taking into account the interests of the transportation system

as a whole. At the same time the Commission is empowered in times of emergency to assume control over the distribution of rolling stock, over the joint use of terminal and other facilities, and over the short-routing of traffic. Other items in the more extended control by the Government over the railroads provided for in the bill deal with the supervision of new railroad construction and extension; the issuance of mandatory orders in respect to safe and adequate equipment; the determination of minimum as well as maximum rates, the supervision of new security issues, and the administration of excess earnings of prosperous roads so as to create a contingent fund out of which loans may be made to other railroads in need.¹ Taken as a whole the new law, while formally abandoning the system of direct government administration in force during the war, sets up an indirect system of control which must become more and more rigid in its restrictions upon the free operation of the individual roads by their owners. The solution reached by the bill is clearly no more than a temporary expedient marking the inability of Congress to see its way to take the more logical step which it must ultimately be forced to take. Sooner or later, whether by the decisive action of the Government or by the gradual process of combination provided for in the law, the last elements of competition must give way before the imperative demand for the greater efficiency of a unified system. This may still leave the railroads under the management of their private owners, unless in the meantime some scheme of government operation may be devised which will give assurance to the public both of the

¹ The financial provisions of the bill include a six-months guarantee of pre-war profits, together with a mandatory order to the Commission to establish rates that will yield to the carriers in each rate-making group a net operating income equal to $5\frac{1}{2}$ per cent. of the aggregate property value of the roads in such group. The labor provisions include the creation of a Railway Board of Appeals which will have compulsory powers of investigation in disputes between the railroads and their employees which threaten interference with interstate commerce.

efficiency which is believed to attend private management and of the absence of political interference by Congress in the interest either of local constituencies or of organized labor.¹

The proposal of the railway brotherhoods. The "Plumb Plan." Pending the decision of Congress between the alternatives of government ownership and operation of the railroads and the reinstating of private capital and management subject to government supervision, a proposal of an entirely different character was put forward by the spokesmen of the four brotherhoods into which the employees of the railroads are organized. Under the name of the "Plumb Plan" the new scheme advocated that the railroads, after being brought under government ownership, should be operated by a single private corporation, run by the employees, the stock of which was to be held in trust for the benefit of the employees, who would pay the Government a rental out of the receipts of operation. The control of the Government was to be exercised through a board of directors of fifteen members, to be selected one-third by the non-appointed employees, one-third by the appointed officers and employees, and one-third by the President as representative of the general public. Two features of the proposed plan are of important political significance: in the first place it marks the application on a large scale of the ideas of "industrial democracy," which in a more radical form have been associated with the principles of the Syndicalists and the Industrial Workers of the World.² It recognizes the "partnership" of labor in the operation of the

¹ It would be outside the scope of the present volume to attempt more than the briefest outline of a problem of the greatest complexity, and it is referred to here only as illustrating the wider extension of the functions of government brought about by the war. Since the above was written, the inability of the railroads to meet the congestion of freight at the great terminals has necessitated the resumption of the unified operation conducted by the Federal Government during the war.

² Any connection with these radical groups is, it should be noted, repudiated by "Organized Labor." See above, p. 237.

railroads, and the right of labor to take an active share in a "democratically" managed industry. In the second place it proposes that in addition to just wages a division of the surplus earnings of the railroads be made as an incentive to more skilful work. Profits in excess of the guaranteed return on bonds are to be divided between the operating corporation and the Government, under an arrangement by which when the Government's share exceeds 5 per cent of the gross revenues a reduction in rates is to be made to absorb the share of the Government. In neither house of Congress did the plan receive any appreciable degree of support, while the criticism of the press, including papers normally sympathetic towards labor, was generally unfavorable. The feature singled out for attack was that the public, as owners of the roads, were to bear all the losses, while the employees were to have a half share of the profits. Moreover, the plan appeared to repudiate even the Socialistic theory of government ownership, which assumes that, granting just wages, the service of the community will be a sufficient incentive to the highest endeavor. It is probable, however, that in spite of these and other objections raised against the plan, the strong support which it received from the railway brotherhoods will bring it again into prominence in a modified form should the present compromise measure adopted by Congress fail to prevent a general strike. Isolated threats of a resort to "direct action" were made at the time the anti-strike provisions of the Cummins bill were under consideration; and apart from such drastic methods of securing Congressional action the entrance into politics of a Labor Party and the announcement of the American Federation of Labor of its intention to elect candidates sympathetic to labor may well have the effect of securing a hearing from Congress.

Private versus public operation of the telegraph and telephone lines. For the time being the advocates of the extension of the control of the Government over the telegraph and telephone systems of the country have been sharply rebuffed

by the prompt return of the lines to their owners after the conclusion of the peace negotiations in Paris. In this case, much more than in that of the railroads, the impression produced of mismanagement by the government officials in charge, together with the higher charges for the service rendered, combined to disillusion many of those who were favorably disposed towards government ownership of the lines. It seems not unlikely, however, that the issue of government ownership will again be pressed in the effort to find a solution for labor disputes similar to those which, as we have seen, forced the Government to take over the lines during the war. Moreover, it is argued that since the telegraph and telephone lines are closely associated, in point of service rendered, with the post-office department, it would require but a slight enlargement of the facilities of the postal administration to operate the two systems. The higher rates charged during the war, it is argued, were no test of what the Government might accomplish in the way of reducing rates in normal times, since the conditions of operation during the war did not admit of merger of the equipment and personnel of the lines with that of the post-office department. Finally, it is claimed that the difficulties attending government ownership of the railroads, whose service is intimately tied up with the industrial life of the country, would not be present in the case of the telegraph and telephone lines, since the functions of the latter are relatively simple and involve no questions of economic policy. But these and similar arguments, however convincing in the abstract, have temporarily lost their force before the concrete experience of an unsatisfactory administration of the lines by the Government, with little or no allowance made for the exceptional conditions of the war. As in the case of the railroads, the persistent belief in the inefficiency of the Government as an administrator must first be overcome by evidence that it is practically possible to isolate the service and conduct it upon the same business principles which prevail in successful private companies. Thus far no steps have been taken by

Congress to meet the recommendation of the President that the competition between the two leading systems and other lesser ones give way to the creation of a single national system.

Government ownership of the coal mines. The demand for the nationalization of the coal mines, which was offered by the miners as a solution of the conditions which led to the strike called on November 1, 1919, was, like the demand for the nationalization of the railroads, an indirect outcome of the control exercised by the Government over the mines during the war. The mine workers, foreseeing a return to pre-war conditions, asserted a right to be "democratically" represented in the management of the industry and at the same time claimed a share in the surplus profits. They proposed that the Government should purchase the mines outright, and that the industry should henceforth be operated under the management of a board of directors similar to that proposed for the railroads by the Plumb Plan. The difference between the two proposals lay in the fact that the railroads were already under government administration and must in any case require a large degree of government control by reason of the many interrelations of transportation and business; whereas the extent of the control exercised by the Government over the coal mines during the war consisted in fixing the price of production and in regulating the conditions of distribution, and there was normally no demand upon the Government to exercise control over the mines except to the extent necessary to protect the public against extortionate charges by the mine owners and against a shortage of coal due to a general strike of the miners. The failure of the strike in the presence of the injunction obtained by the Government under the Lever Act resulted in a temporary set-back to the demand for nationalization, even though the wage increases for which the strike was called were subsequently met in part. The menace of a general strike is, however, a weapon which can again be resorted to under more favorable conditions should similar

conditions among the workers lead them to press their claims in that way. At the same time the growing shortage in the supply of coal and the sharp increase in prices may have the effect of leading the public at large to bring pressure to bear upon Congress either to take over the mines as a whole or to institute a system of administrative control similar to that in force during the war.

Government operation of the merchant marine. We have seen the wide range of activities performed during the war by the United States Shipping Board and the Emergency Fleet Corporation in connection with the direction and control of existing shipping facilities as well as the construction of new ships and the procuring of crews to man them. At the time it was the belief of many observers that such an extension of the functions of the Government must inevitably result in a permanent policy of government control, with the Government either in the rôle of competitor with private shipping companies or exercising indirect administrative powers similar to those possessed by the Interstate Commerce Commission in the case of the railroads. The event has belied these promises. At the moment of present writing, the Shipping Board, after having sold several of the ships owned by the Government and made unsuccessful efforts to sell others, has decided to await the action of Congress as to the proper steps to be taken. Together with the Government vessels already completed or still under construction in American yards are thirty former German passenger-liners, the majority of which were remodeled after the outbreak of war and used as transports until the fall of 1919. There is here the nucleus of what might be made an American merchant marine adequate to meet the growing needs of foreign commerce if it can be found possible to keep the ships under the American flag. Prior to the war the Government had followed the policy of non-interference, leaving it to private capital to invest in merchant shipping according to the promise of profit, with the result that foreign companies secured most of the overseas trade. Immediately upon

the outbreak of war the diversion of British merchant ships to uses of war and the capture or internment of the German ships resulted in a serious impairment of the facilities necessary to American trade; and it was promptly realized that henceforth the United States must be put in a more independent position in respect to its carrying trade. Earlier proposals to the same effect, having chiefly in view the necessity of maintaining a fleet which could furnish to the navy auxiliary vessels in time of war, had always been blocked by the question whether subsidies should be granted by the Government to enable American shippers to meet the competition of foreign countries. Such measures as the La Follette Seaman's Act, by requiring a higher standard of working conditions upon American vessels, had been a handicap in favor of countries not maintaining the same level of hours of labor and wages.¹

Government control over labor. Compulsory arbitration. It was noted as a point of striking significance in the study

¹ While the proposal of a merchant marine owned and operated by the Government appears to have been definitely repudiated by Congress, the Shipping Board, in attempting to dispose of the vessels left on its hands at the close of the war, laid down conditions of sale which were intended to keep the ships under the American flag. Moreover, it was stipulated that not only should the ships be continued in American service, but they should serve the routes which in the opinion of the Shipping Board would best further American commerce, and also that the ships should be available to the Government in time of national emergency.

The Jones Merchant Marine Act, as finally adopted, creates a permanent government agency of control to be known as "The United States Shipping Board," an enlargement of the former Shipping Board, whose powers in respect to foreign commerce are to be similar to those exercised by the Interstate Commerce Commission over commerce between the States. The act provides that the merchant fleet now under control of the Emergency Fleet Corporation shall be sold only to American individuals or corporations, and that pending the offer of fair prices the ships shall be either leased to American citizens or operated by the board itself. The act thus marks a radical departure in the policy of the Government towards an American-owned merchant marine.

of the functions of the Government during the war that while the Government extended its control over one part after another of the country's industrial life, it stopped short of assuming authority over the labor forces engaged in production and distribution. Employers were taken in hand, their supplies of raw materials were curtailed, the prices of their products fixed, and their interests in general subordinated to those of the war. But labor maintained all the while its independence of action, and although acquiescing in certain limited measures of control in the form of mediation commissions for the settlement of disputes, it resisted any form of actual compulsion. Serious strikes were avoided by a policy of successive concessions to the demands made for higher wages and improved conditions, while on its part labor refrained from pressing demands which the various mediation and conciliation boards might have found themselves unable to concede. The question now arises as to what measure of control the Government may exercise over labor in certain vital industries, now that the temporary truce between labor and capital is at an end. Taking the labor conditions of the railways as an illustration, we find that the railway brotherhoods are willing to accede to the settlement of industrial disputes by a compulsory judicial board, provided labor is represented upon the board of directors, as in the case of the "democratically" constituted operating company provided for in the "Plumb Plan." In the absence of democratic representation labor is unwilling to be bound by the decisions of an arbitral board. The original Cummins bill provided that ultimate control over wages and terms of employment be given to a government Transportation Board, and that at the same time it should be made illegal to strike. In answer to this proposal Mr. Gompers, testifying in the name of the American Federation of Labor before the Interstate Commerce Committee, asserted that he could not underwrite any measure that would "absolutely prevent a general railroad strike," and that he would rather see the "country inconvenienced than the slavery this

bill would cause." The issue was thus raised whether in the case of an industry so closely affecting the country's vital needs Congress might undertake to protect the public against the possible unreasonable demands of organized labor as well as against the arbitrary decisions of the owners themselves. The solution reached in the Esch-Cummins bill consists in the creation of a Labor Board of nine members, to be appointed by the President, which is to have advisory power over wages, hours, and conditions of work. The Labor Board is to represent equally the public, the employers, and the employees, and while no element of compulsion enters into its awards, reliance is apparently placed upon public opinion to enforce the acceptance of its decisions. The idea of compulsory arbitration in the sense of making the awards of the court binding upon the parties, so as to authorize the Government to compel their execution, is foreign to American traditions. But compulsory public hearings before strikes are called, with general public opinion as the sanction of the observance of the award, are necessary to the protection of the public in its dependence upon vital industries.

CHAPTER XII

THE PROGRAM OF INTERNATIONAL RECONSTRUCTION

Effect of the war upon international relations. Changed position of the United States. It is impossible to outline the problems of political reconstruction in the United States created by the war without reference to the changes that must inevitably be brought about in the foreign policies, and to some extent in the domestic policies of the country, by the new international relationships established among the states of the world. Even though the Senate has refused to ratify the treaty of peace with Germany with the Covenant of the League of Nations attached to it, it is clear that the participation of the United States in some form of international organization to maintain the peace of the world will continue to be a pressing issue in the years to come. Prior to the war the United States had lived in a state of political isolation from the great powers of Europe, moving in a sphere of its own outside the orbit of their alliances and their common councils. Side by side, however, with this policy of political isolation there had developed a policy of economic internationalism based upon the existing facts of world trade, just as the political attitude had been based upon traditions inherited from the days of Washington. It remained for the war to show the inconsistency of the two positions. The central incident attending its outbreak struck at the very foundations of the system of political isolation. For it placed the United States in the position of being a silent and inactive onlooker in the presence of a flagrant breach of international good faith. The moral reaction of the country against the violation of the neutrality of Belgium was soon followed by a

sharp realization that its economic interests were being vitally affected by the conflict, while the lives of its citizens were endangered by modern methods of warfare at sea. At the same time altruistic motives were aroused when the Government undertook to play the part of mediator between the belligerents by proposing a statement of the terms upon which they would be willing to conclude peace. The subsequent participation of the United States in the war led to successive statements of the principles of a just peace and of the necessity of an organization to make them effective. When, however, the negotiations of the peace conference resulted in the creation of the League of Nations as an integral part of the several treaties of peace, opposition of the sharpest character developed. The dual function assigned to the League, of being at once the administrator of the provisions of the treaties and the potential guarantor of the future peace of the world, aligned against the Covenant both the smaller number of those who were opposed to the specific provisions of the treaty of peace with Germany and the larger number of those who were opposed to the participation of the United States in the League whether in the form proposed or in any form whatever. Earlier test votes as well as the final vote by which the treaty failed of ratification on March 19 showed a large majority in favor of the general principle represented by the Covenant of the League, a majority, less than the necessary two-thirds, in favor of the actual League, subject to a series of qualifying reservations, a minority standing fast on the Covenant without reservations affecting its substance, and a small group of "irreconcilables" who were opposed to the League in principle. The result was a victory for the "irreconcilables," constituting less than one-fifth of the total vote of the Senate.

The principle of state sovereignty. The repudiation, therefore, by the Senate of the Covenant of the League of Nations still leaves intact the general principles upon which the League is based; and in consequence it remains an important problem of reconstruction to determine to what extent

these new principles are to limit or restrict the powers conferred by the Constitution upon the several agencies of the United States Government. The fundamental conception of the new order of international relationships is that of the collective responsibility of the nations at large for the peace of the world. Before 1914 the dominant principle of international law was to be found in the mutual recognition by the nations of their individual sovereignty. Precisely what was meant by the term "sovereignty" is difficult to determine, owing to the fact that the theory of international law and the facts of international life were not in harmony. As a legal theory sovereignty called for the supreme right of the state to direct the administration of its internal affairs and to determine the character of its foreign policies without interference from other states. But it is obvious that the theory assumed an independence of action which was daily contradicted by the facts of international intercourse. In numerous details the hands of the nations were bound by an elaborate array of treaties and customs, which were wholly inconsistent with the strict theory of state sovereignty. But these treaties and customs related merely to the lesser interests of the nations. In matters involving national self-protection or important commercial policies the abstract theory of sovereignty was seen to be an actual reality. The United States, with other nations, reserved to itself complete freedom of action in the determination of the measures upon which it believed its security and prosperity to depend. In respect to these questions the sovereign state undertook to determine for itself the validity of its own claims of right. If a dispute arose between itself and another state involving such matters, it remained for the individual state to decide whether it would submit the case to arbitration, and if so, upon what conditions. The result of this doctrine of sovereignty was that the authority of international law remained of a very limited character. On the most important problems of international relations there was no rule of conduct to be found, and even in respect to those

questions upon which a rule of law existed each nation remained the interpreter of its own rights and obligations in the case.

National armaments and international anarchy. Consistently with the principle which made each nation the ultimate arbiter of its own rights and obligations, each nation undertook to rely solely upon its own efforts to maintain what it claimed as justly due to it. Individual self-protection was the logical corollary of individual self-determination of rights. War thus became a legal remedy, and the results obtained by a successful war acquired legal validity in spite of the fact that force had been used to secure them. What should be the measure of the armaments maintained by each state for alleged purposes of self-defense was, like the question of the propriety of their use, left to the individual nation to decide. Each government took counsel with itself as to its needs and as to its financial resources and struck a balance between them. Where national resources were inadequate, the state sought alliances with other states similarly situated, and these alliances were in turn met by counter-alliances of opposing groups. A "balance of power" was thus secured, which afforded a measure of security so long as the equilibrium could be kept stable. The resulting situation can without exaggeration be described as a condition of international anarchy. There was a complete lack of a sense of collective responsibility on the part of the nations as a body. The dominant conception of national law, that the protection of the rights of the individual citizen is best attained by the cooperative action of the community in establishing common agencies of justice, did not enter into the code of international law. On many of the important questions of diplomacy which arose during the generation preceding the war the leading nations of Europe and America entertained similar conceptions of justice and right, but practically no attempt was made to coordinate those conceptions and construct from them a collective international judgment. In consequence, the crisis which arose with such

dramatic suddenness in July, 1914, found the nations completely lacking not only in an organization to make their common judgment effective, but even in the conviction of an obligation to act in concert for the maintenance of peace. It was therefore legally possible for the United States, in the presence of a clear and gross violation of international law, to issue a declaration of neutrality and assume a position of official indifference to the outcome of the war.

Collective responsibility under a League of Nations. The subsequent abandonment by the United States of its neutral position, while primarily brought about by the ruthless attack upon its rights by one of the belligerents, was undoubtedly made possible by the realization on the part of the American people of the fundamentally illogical character of international law. The neutrality of third parties in the presence of public crime was a position so completely at variance with the primary conception of law and order that it could not but provoke general condemnation. At the same time it was clear that the American people would not relinquish their traditional attitude towards the political controversies of Europe except in connection with some general plan for preventing those controversies from culminating in war. American intervention in Europe must take the form of supporting measures to prevent the commission of acts of injustice, not of waiting until wars had broken out and then taking sides against the aggressor. If the principle of collective responsibility was to take the place of the old legalized anarchy, it must be supplemented by an organization capable of expressing the common judgment of the nations as a body upon questions in dispute between individual states, and capable of bringing the common will of the nations to bear effectively upon the contending parties. This necessary connection between a new principle of international relations and an organization to make it effective found formal expression in the Covenant of the League of Nations; and in spite of the present failure of the United States to participate in the League because of difficulties aris-

ing from the concrete functions of the League it is believed that the principle of collective responsibility which the League embodies has been generally accepted by the American people. Article XI of the Covenant states in explicit terms that "any war or threat of war, whether immediately affecting any of the high contracting parties or not, is hereby declared a matter of concern to the League." Wars and threats of wars have, indeed, always been a matter of concern to the nations individually; they are here declared to be of concern to the nations in their collective capacity as members of the League. Again in Article XVI it is laid down that if any of the contracting parties should break the agreements to arbitrate contained in Article XII it shall thereby "ipso facto be deemed to have committed an act of war against all the other members of the League." None of the reservations which prevented the final ratification of the treaty of peace repudiated the principle of collective responsibility here recognized. Even the guarantee contained in Article X, by which the members of the League agreed "to respect and preserve as against external aggression the territorial integrity and existing political independence of all the members of the League," was not rejected because of the principle of mutual protection involved, but merely because of doubts as to the possible application of the principle. It was believed that the guarantee might have the effect of confirming existing territorial possessions in certain cases, such as that of Ireland or of Shantung, where they were believed to involve injustice, and of committing Congress to a declaration of war without its prior consent in each case. It is true, however, that the reservation by which the United States retains the right to decide for itself what questions are within its domestic jurisdiction, together with the elaborate enumeration of those questions, seriously narrows the application of the principle of collective responsibility, and leaves it not altogether certain whether the principle itself has not been repudiated in conceding to it so limited a field in which to operate.

Conditions of success of an international organization to maintain peace. In view of present conditions any estimate of the part which the United States may in time come to play, under altered circumstances, in the development of an international organization to give effect to the principle of collective responsibility would be apart from the concrete problems raised by the present study. But this does not dispense us from the necessity of examining briefly the conditions upon which such an organization must depend for its success, as well as the effect which those conditions must have upon the agencies of government within the individual states composing the future league. For while the Senate has been unable to agree upon the terms upon which it would be willing to have the United States become a member of the present League, it is clear that the participation of the United States in an amended form of the League must continue to be a leading issue in the policies of the great political parties, and must find expression in the party platforms and in the campaign addresses which are part of the political education of the American voter.¹ This examination of the conditions of success of an international organization for the maintenance of peace is all the more important because of the fact that there appears to be a widespread misunderstanding of the true character of a league of nations. Many who reject the present League profess to believe in an ideal league, a league which shall be effective to prevent war and yet not encroach upon national sovereignty, a league which shall settle disputes between the nations on a basis of justice and yet call for no sacrifices from the individual members and leave them untrammelled in

¹ Since the above was written the Republican Party, at its National Convention at Chicago, adopted a platform in which, while repudiating the Covenant of the League of Nations as signed by the President at Paris, the party proclaims itself in favor of an international association "which shall maintain the rule of public right by development of law and the decisions of impartial courts and which shall secure instant and general international conference whenever peace shall be threatened by political action."

the control of all matters which they at present regard as domestic interests. It will be found, however, that many of the objections which have been raised against the present League hold with equal weight against any form of international organization which has a similar object in view; and unless these objections are fairly met the discussions of ideal and actual leagues will lead to no tangible result.

Restrictions upon "sovereignty." In the first place no international organization is possible which does not encroach to some degree upon the sovereignty of its member states. Even as understood in the recent past sovereignty did not exclude numerous restrictions upon arbitrary conduct; but, as we have seen, the restrictions bore only upon the lesser interests of the nations. In the future it is clear that each step in the direction of restraining the free will of the individual state through the agencies of arbitration must to a corresponding degree narrow the field in which sovereignty may operate. To advocate a league which is "compatible with the sovereignty of the United States" is either to demand things which are mutually exclusive, or else to use the term sovereignty in a more restricted sense than international law has attributed to it in the past. If by sovereignty is meant local autonomy, the right of each state to decide for itself matters of purely domestic concern and to follow its own ideals of national progress without interference from other states, it may still be possible to speak of a league of sovereign states.¹ But if sovereignty is to include the whole range of domestic and foreign policies, even where those policies come into conflict with those of other states, it is obvious that there is no compatibility between sovereignty and the fundamental conception of a league of nations. The reservation adopted by a majority of the Senate which declared that "all domestic and polit-

¹ The reader will recall the curious illusion which led to the announcement in the Articles of Confederation of 1781 that "each State retains its sovereignty, freedom, and independence." Subsequent provisions contained a practical negative on each point.

ical questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, commerce, the suppression of traffic in women and children, and in opium and other dangerous drugs, are solely within the jurisdiction of the United States and are not under this treaty to be submitted in any way either to arbitration or to the consideration of the Council or of the Assembly of the League of Nations" came close to an assertion of unlimited sovereignty. Similar reservations adopted by the other powers as a condition of entering the proposed League would practically negative the working powers of the League. In like manner a reservation by each member of the League of its own equivalent of the American Monroe Doctrine would carve out from the jurisdiction of the League those very problems which if left to the arbitrary judgment of the individual state must result in war. It may well be that under the present political conditions of Europe a majority of the Senate, perhaps of the people of the United States, are unwilling to entrust to the Council or the Assembly of the League the questions set forth in the reservation; but unless it is recognized that all questions which affect the peace of the world, whether belonging to the class traditionally called domestic or not, are properly a subject for international inquiry and arbitration, it is futile to talk of a future and better league of nations. The terms "super-state," "international government," "international federation," appear to be obnoxious even to those who favor an organized society of nations. Yet the facts represented by those terms must ultimately be faced as an essential condition of "collective responsibility" when reduced to a concrete working basis.

The need of international legislation. The fundamental problem which any form of international organization must sooner or later take up is the creation of a clearer and more comprehensive code of international rights and duties. Many of the international disputes that have arisen in the past have been due not so much to an unwillingness on the part of the

nations to abide by the law as to the absence of any clear rule by which their conflicting claims might be judged. International law has been allowed to develop by the slow growth of custom and by the conclusion of separate treaties between individual nations. The international conferences that met at The Hague in 1899 and 1907, which might have enlarged the domain of international law and laid the basis of a constructive code of rights and duties, limited their activities to projects of voluntary arbitration and to restrictions upon the conduct of war. The result was that the most fundamental rights of national existence either remained outside the code of international law, or were covered by such general principles as to afford no adequate basis of adjustment in cases of conflict. The right of self-preservation remained in as primitive a form as in the days of self-help between private individuals. Self-protection justified intervention in the affairs of another state, but it was not clear under what circumstances this right might be exercised. Self-defense justified national armaments, but there were no limitations as to the size of such armaments, and alleged self-defense easily became a cover for designs of aggression. The self-determination of nationalities was not recognized as a principle in the creation of new states; the right to abate a nuisance was unknown as a rule of law; and the right to protect citizens in foreign countries was so uncertain as to give rise to frequent disputes. To an even greater degree the economic interests of the nations remained outside the scope of international law. A nation lacking the raw materials of industry struggled as best it might to obtain them from other more favored nations; exclusive control of the resources of undeveloped nations became a legitimate object of national policy; while foreign markets for the surplus products of industry and favorable opportunities for the investment of capital became the object of the sharpest competition. In the face of these facts it cannot be doubted that the first step in the development of an effective league of nations must be the provision for some form of international

legislature which shall undertake the task of framing a constructive code of law governing the political and economic rivalries of the nations. Obviously such a code, even in its first most tentative form, must restrict to some degree the legislative powers of national parliaments. To those who believe in the principle of "a governed world" the question is, in reality, not whether an attempt shall be made to formulate new rules of law to take the place of the existing political and economic anarchy, but merely whether the rules adopted by the legislative agency of the international organization shall require the ratification of Congress before they can become binding upon the United States. On this point it need only be said that so long as the central parliament of the nations is not a parliament of the peoples, but of delegates appointed by the Governments of the several states, it can scarcely be expected that its enactments would be accepted by the nations as binding upon them without the express consent of their national legislatures in each case. In spite of the delays and evasions incident to individual ratification by each state, at the present stage of international development it is not feasible to demand that agreements reached by an international assembly should have the final and authoritative force of national statutory law.

The scope of arbitration. The progress of international arbitration must depend in large part upon the development of a code of substantive law. Not that in the absence of a clear rule of rights and duties it is not possible for the nations to submit to inquiry and arbitration disputes that arise between them, in the hope that a principle of justice may be found to fit the case in hand; but that the clearer the mutual rights and duties of the nations become the fewer disputes will arise between them and the less often will there be a claim that a particular dispute involves the honor or the vital interests of the nations involved. The plan of an international court having general and compulsory jurisdiction over the disputes of the nations, in the same way that suits between citi-

zens are submitted to the jurisdiction of national courts, has thus far always been regarded by statesmen as impracticable in a world of nations so diverse in political character and material interests. The Second Hague Conference succeeded in registering a general approval of "the principle of compulsory arbitration," but could not reach an agreement making the principle applicable even to a limited range of cases. The general arbitration treaties which the United States has from time to time entered into have regularly left some loophole by which the Government might evade the necessity of arbitrating a particular dispute should it deem it inexpedient to do so. The Root treaties of 1908 made a specific exception of disputes affecting "the vital interests, the independence, or the honor of the two contracting states." The Taft or Knox treaties of 1911 divided disputes into such as were "justiciable in their nature" and such as were not justiciable, the latter being excepted from the obligation to arbitrate. The Bryan treaties omitted the distinction between the character of the disputes, but imposed no other obligation upon the parties than to refrain from declaring war pending the investigation and report of an international commission. Even the Covenant of the League of Nations does no more than follow the Bryan treaties in requiring its members not to resort to war pending the submission of a dispute to inquiry or to arbitration; and no obligation is imposed to accept the award rendered except the negative obligation of not making war upon a state which complies with the recommendations made by the Council or the Assembly. Questions within the domestic jurisdiction of one or other of the parties are excluded from the obligation to arbitrate, but the decision as to whether a particular dispute falls within that class is entrusted to the Council of the League.

Objections to compulsory arbitration. That the difficulties in the way of general and compulsory arbitration are very real ones cannot be denied. For the most part they are due, as we have seen, to the absence of a definite code of inter-

national rights and duties, which is in turn due to the marked diversities of national character and of political and economic interests which exist among the states of the world. Equality before the law is a principle difficult of application in a world consisting of some forty-six states, large and small, of varying degrees of material progress, and the different ideals of civilization. Thus far little attempt has been made to cut across state boundaries by the formulation of fundamental interests common to the nations of the world as a body; and such efforts as have been made in that direction have been popularly discredited by their association with radical labor movements.¹ Yet until such a basis of common fundamental interests can be laid, and until confidence has been created that justice can be better obtained by the impartial decision of an international tribunal than by resort to individual self-help, it is not to be expected that the nations will agree to submit their disputes to arbitration without exception of the character of the interests involved and pledge themselves in advance to carry out the award of the court. For the present no more can be hoped than that courts of optional jurisdiction may be established, before which disputes can be brought and subjected to discussion in the light of such general principles of justice as prevail among the nations. A more permanent court has been proposed for the settlement of disputes readily susceptible of a legal decision, leaving the so-called "political" disputes to the decision of temporary arbitration tribunals chosen by the contending parties for the particular case in hand. Ultimately it may be possible to introduce into international law the rule of national law which admits no ex-

¹ It is not overlooked that there have been many international literary and scientific associations of a private character whose activities have helped to draw together persons of similar interests, and that there are in existence international administrative agencies, such as the Universal Postal Union, created by the states themselves for the purpose of regulating matters of common convenience; but in neither case do the subjects involved reach to those more vital interests which are the real causes of international conflict.

ceptions from the obligation to arbitrate. In the meantime it must at least be recognized that the reservation by the Senate from the jurisdiction of the international court of the wide range of questions above enumerated can be justified only as a temporary policy, and that it is inconsistent with the basic principle of an effective league of nations. It is only by a gradual approximation to those fundamental conceptions of law which have brought orderly government within national boundaries that international law can become adequate to offset the forces that make for war.

National armaments and international execution. Intimately associated with the problem of formulating a code of rights and duties and of providing courts for the settlement of conflicting claims is the question of providing an effective sanction for the rule of law thus adopted. Hitherto international law has been lacking in any sanction for its rules other than the moral sanction of the approval or disapproval of unorganized public opinion in the several nations. There has been no executive body whose duty it was to give effect even to the lesser rules which had come to be recognized as binding by custom or which had been adopted by treaty. But while it has long been recognized in principle that some co-ordinated action on the part of the nations as a body was needed to restrain individual offenders against the law, the alliances and counter-alliances of Europe have made even the most tentative steps towards such cooperation appear impracticable. The Covenant of the League of Nations meets the need of a physical sanction of international law by authorizing two limited forms of concerted action: Article XVI provides that a breach of the agreement to arbitrate shall be regarded as an act of war against all the other members of the League, and shall be followed by a "severance of all trade or financial relations" between the members of the League and the offending state. Should this economic boycott prove ineffectual, or should it require the support of armed forces, the Council of the League is authorized in such cases to recommend to

the several governments concerned "what effective military or naval force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League." Whatever criticism may be directed against the dangers to which these two forms of international sanction might give rise under present conditions, no advocate of an international organization for the maintenance of peace can fail to realize that the principle of cooperation upon which they are based is sound. Competitive armaments are directly at variance with the principle of collective responsibility. Yet no progress can be made in the direction of reducing national armaments until evidence is forthcoming that the international organization will be able to afford to its members a measure of protection equivalent to that which they believe themselves to possess in their own individual armies and navies.¹ This protection in turn can only be obtained on the

¹ It is instructive to note that in December, 1919, the General Board of the United States Navy recommended that unless some limitation be placed upon the size of armaments by international agreements or through the League of Nations, the American navy should be gradually increased until it should ultimately be "equal to the most powerful maintained by any other nation of the world." This increase was justified on the ground that "the United States borders upon two oceans and the protection of our coasts, together with the great increase in our merchant marine, renders necessary the possession of a navy by the United States large enough to protect our national interests in both oceans." The recommendation of the General Board has been somewhat discredited by an earlier statement to the same effect by the Secretary of the Navy which was popularly interpreted as an attempt to coerce the powers of Europe to assist in the creation of the League of Nations. A similar policy was, however, adopted in 1916 by the Sixty-fifth Congress. In the naval appropriation act of that year it was declared that it was the policy of the United States to settle its international disputes through mediation and arbitration, and that the United States looked with apprehension upon a general increase of armament throughout the world, but realized that no single nation could disarm in the absence of a common agreement of the great powers. The act then recited that, if at any time before the construction authorized should have been contracted for, there should be established, with the cooperation of the United States, an interna-

assumption that the nations recognize a dominant interest common to them all, and the necessity of collective action to secure it. Cooperation to maintain peace on a basis of accepted principles of justice becomes, therefore, the starting-point of any effective plans of disarmament. Once more we are brought round to the primary problem of creating a more definite understanding of international rights and duties. The persistent distrust of an international executive body is largely due to uncertainty as to the purposes for which it might be used. The bitter attacks in the Senate upon Article X of the Covenant of the League, which guarantees the territorial integrity and existing political independence of the members of the League, as well as the attacks upon Article XVI, which provides for the economic boycott and possible military action, were for the most part based upon the fear lest the United States might be called upon to cooperate in carrying out some decision of the League to which it could not give its approval. For the time being a conditional obligation, subjecting the decisions of the League to the ratification of the national Congress, would seem to be the furthest step which the public at large is prepared to take.

Primary condition of international organization. The primary condition of the success of any international organization for the maintenance of peace is, therefore, the recognition by the nations of the preeminent importance of the object to be attained and the necessity of mutual and coordinated measures to attain it. A common interest on the part of the nations in law and order must be supplemented by a collective tribunal "which shall render unnecessary the maintenance of competitive armaments, then and in that case such naval expenditures as may be inconsistent with the engagements made in the establishment of such tribunal or tribunals may be suspended, when so ordered by the President of the United States." The limitation of armaments does not, it is true, of itself imply the abandonment of individual self-defense in favor of collective action; but conversely the connection between the two, if the experience of national governments can be relied upon, is very close.

responsibility in the establishment and maintenance of the institutions and agencies needed to secure the desired object. This collective responsibility implies the repudiation of the old theory of sovereignty which made each state the ultimate arbiter of its own claims and obligations and the ultimate guardian of its own interests. The prevailing condition of anarchy in respect to many of the fundamental rights and duties of nations must give way to a constructive code of law. A tentative division must be made between those internal and domestic interests, which are essential to national self-government, and those external interests which are the grounds of dispute between nations, and which must be adjusted on the basis of the welfare of the nations as a whole as against the selfish interest of the individual state. With the gradual growth of such a constructive code of law the scope of international arbitration must be extended to cover disputes of whatever nature that cannot be settled by direct negotiation between the parties. The collective judgment of the nations as a body must be brought to bear upon the controversies which threaten a rupture of peaceful relations between two or more states. The resort to arbitration by the disputants and the submission of the losing state to the award of the court must be enforced by the agencies of the international organization through the use of economic or military measures according to the needs of the case. These are the fundamental principles of any international organization which seeks to substitute law and order for the present international anarchy. That they must have important restrictive effects upon the present sovereign will of the United States, as well as of every other state, limiting in one way or another the legislative, executive, and judicial agencies of the Government, is demanded by the nature of the cooperation they call for. Whether under present conditions it is expedient to create such an international organization, whether the League of Nations in its existing form offers a basis upon which to build the more effective agency required to meet the needs of the world,

are debatable issues. What is clear and indisputable is that at no time, whether under happier or less favorable auspices than at present, can international law in the true sense of law replace the existing anarchy except at the cost of some concession of the traditional national sovereignty and the old arbitrary decision by each nation of what are called "political" questions.

The conversion of public opinion into law. The problem of international reconstruction is obviously larger than the mere formulation of a covenant or the creation of legal agencies to give effect to its provisions. The history of national governments has made it sufficiently clear that programs and institutions have in themselves no saving grace, and that they can but depend for their successful operation upon the spirit of friendly cooperation which animates them. Between nations as between individuals self-restraint and mutual forbearance are essential conditions of reaching an adjustment of conflicting aspirations and policies. No one can witness today the struggle which is going on between the nations for the possession of the raw materials of industry, for new markets for surplus products, for favorable opportunities for the investment of capital in undeveloped countries, without realizing the many obstacles that lie in the way of effective international organization. Mutual concessions must be made and material interests sacrificed, if any appreciable progress is to be made. The narrow nationalism which seeks to promote the welfare of the individual state at whatever cost to others must be replaced by a willingness to share in a prosperity primarily accruing to the world at large. The ideal of a "governed world" can only be attained at the price of some temporary, perhaps even permanent, loss of direct national advantage. Assuming a recognition by the nations of the necessity of such sacrifices, it would seem imperative that the first step must be taken towards creating definite institutions which may give concrete expression to those ideals. Some form of political organization must be set up which shall provide a meeting-place for the representatives of the nations,

where the forces which in different countries seek the same ideal may be directed to their common purpose, and where legal validity may be given to organized public opinion. Agencies must be created to which a larger measure of jurisdiction may by degrees be granted according to the promise which they give of effective operation. To await the creation of an ideal League before being willing to participate in it is to turn one's back on the experience of political development within national boundaries.

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